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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. CHADWICK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-30a) is not yet reported. The opinion and supplemental opinion of the district court (App. C, *infra*, pp. 32a-63a) are reported at 393 F. Supp. 763.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 31a) was entered on March 29, 1976. On April 19, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a search warrant is required before federal agents may open a locked footlocker that is properly in their possession and that they have probable cause to believe contains contraband.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On May 8, 1973, federal agents in Boston received reliable information from their San Diego counterparts that respondents Machado and Leary (then traveling as "Mrs. Machado") had loaded a

brown trunk or footlocker onto an Amtrak train in California and were bound for Boston (App. C, *infra*, p. 34a). The footlocker was leaking talcum powder, which is often used to cover up the odor of controlled substances. Respondent Machado also fit a profile used by Amtrak officials to spot drug traffickers (*ibid.*).

The train arrived in Boston on the evening of May 10, 1973, and federal agents met it at the station. The agents saw Machado make a telephone call after his arrival, but they were unable to see the number called or to overhear the conversation (App. C, *infra*, p. 35a). They observed the footlocker as it was removed from the train, placed on a baggage cart and taken to the station area, where it was claimed by Machado and Leary. Machado and Leary placed the trunk on the floor and sat down on it. Two suitcases were nearby.

The agents confirmed their suspicions by having a dog trained to smell controlled substances go to the footlocker.[1] The dog "alerted" to the footlocker by scratching on it, indicating that a controlled substance was inside (App. A, *infra*, p. 4a; App. C, *infra*, p. 35a). The agents did not have the dog sniff the suitcases.

Respondent Chadwick soon arrived at the station in an automobile. Leary and Machado, with the help

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[1] Investigation with the aid of a trained dog is permissible under the Fourth Amendment. *United States* v. *Race*, 529 F.2d 12 (C.A. 1); *United States* v. *Bronstein*, 521 F.2d 459 (C.A. 2).

of a porter, took the footlocker and suitcases to Chadwick's car. The footlocker and one suitcase were loaded into the trunk; Leary took the other suitcase and entered the front seat (App. C, *infra*, pp. 35a, 52a-53a). The agents then arrested all three respondents. Shortly after his arrest, respondent Chadwick made incriminating statements to the agents. The footlocker and the two suitcases were taken to a federal building in Boston where, approximately 90 minutes after the seizure, they were opened (*id.* at 35a-36a). The footlocker had been double-locked, and it was opened with keys that had been in the possession of Machado. The footlocker and both suitcases contained marijuana (*id.* at 35a, 53a).

2. On November 2, 1973, an indictment returned in the United States District Court for the District of Massachusetts charged respondents Machado, Leary and Chadwick with possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with conspiracy to commit that crime, in violation of 21 U.S.C. 846. Respondents filed pretrial motions to suppress Chadwick's statements and the evidence obtained from the footlocker and the suitcases. In reply, the government argued that the search of the suitcases was a proper inventory inspection, necessary to protect agents against charges that they had stolen property that had been seized. It justified the opening of the footlocker both as a search incident to an arrest and as a search based upon the "automobile exception" to the Warrant Clause of the Fourth Amendment. The district court rejected each

of these arguments and suppressed the evidence obtained from the searches (App. C, *infra*, pp. 45a-51a, 54a-61a). It also suppressed respondent Chadwick's statements, holding that there had not been probable cause to arrest him and that the statements were tainted fruit of the illegal arrest (*id.* at 37a-44a, 62a-63a).

3. A divided court of appeals affirmed the suppression of the marijuana found in the footlocker.[2] The court concluded that the footlocker had been properly seized (App. A, *infra*, pp. 17a, 19a). It then inquired whether it was reasonable to open it. Beginning with the premise that warrantless searches are presump-

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[2] The court of appeals also affirmed the district court's suppression of respondent Chadwick's statement and of the marijuana found in the suitcases. We do not agree that there was not probable cause to arrest Chadwick, but we have not presented this as a question for this Court because it appears to involve only the application of settled principles to particular facts. As to the opening of the suitcases, we believe that under many circumstances it is reasonable to inspect personal belongings discovered near a person at the time of his arrest in a public place, a proposition with which the court of appeals has agreed. See Pet. App. 23a; *United States* v. *Eatherton*, 519 F.2d 603 (C.A. 1). In the present case, however, the agents did not possess probable cause to believe that the suitcases contained contraband, they were not recovered from an area within the immediate control of respondents at the time of their arrests, and the only justification offered in the court of appeals for their inspection was the agents' desire to "inventory" their contents. Under these circumstances, the opening of the suitcases does not present the same questions as does the opening of the footlocker, and we do not seek review of the judgment of the court of appeals insofar as it affirmed the district court's suppression of the marijuana seized from the suitcases.

tively unlawful in the absence of one of a few narrow circumstances, the court stated that "[t]he question * * * is whether [this] warrantless search fits within one of the exceptions to the constitutional requirement of a warrant" (*id.* at 8a). It concluded that it did not.

The "automobile exception" did not control, the court held, because the seizure of the footlocker occurred just after it had been deposited in the parked car's trunk and before any effort had been made to drive the car away. In these circumstances, the car "was nothing more than a platform or resting place for the footlocker," and the court perceived no reason "why the footlocker's placement in the car trunk should make it any more searchable than if the arrest had occurred in the station area" (*id.* at 9a-10a).

The court also held that the opening of the footlocker could not be justified as incident to the arrest of respondents. Noting that the trunk was securely locked and weighed approximately 200 pounds, the court held that the trunk was not "in any meaningful sense * * * under [respondents'] immediate control" at the time of their arrest, because they could not have either quickly removed it or reached inside it to destroy evidence or obtain weapons (App. A, *infra*, p. 15a).

Finally, the court rejected the argument that movable containers such as footlockers should be treated like automobiles. The court conceded that "baggage or goods in transit present some of the same characteristics as automobiles. Unless immobilized, such

items may disappear before a warrant is obtained" (App. A, *infra*, p. 17a). Expressly declining to follow other courts of appeals in this regard, however, the court refused to permit the warrantless search of the footlocker. The court believed that a rule allowing the search of such belongings on probable cause has not "received sufficient recognition by the Supreme Court outside the automobile area, or generally, for us to recognize it as a valid exception to the fourth amendment warrant requirement" (*ibid.*). The court concluded that "[i]f an exception of this character is to be translated to an entirely different class of objects, we think the Supreme Court should make the judgment" (*id.* at 18a-19a).[3]

The dissenting judge, aligning himself with other courts that the majority had declined to follow, argued that the opening of the footlocker was proper once "there was probable cause to believe that it contained contraband and was being used in committing the offense" (App. A, *infra*, p. 29a). In his view, "the principles which control the right of an officer to arrest without a warrant a person who is committing a felony in his presence in a public place should also permit the officer to open a suitcase, a

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[3] In a similar vein, the court earlier had said that, although the Supreme Court might "relax the 'immediate control' test in the baggage search area, by reinterpretation or otherwise[,] * * * it would be speculation, and perhaps even presumption, for us to initiate such a change" (App. A, *infra*, pp. 12a-13a, n. 4).

footlocker or other container which he has probable cause to believe is being used to commit the offense in his presence and to seize the contraband therein" (*id.* at 29a-30a; footnote omitted).

REASONS FOR GRANTING THE PETITION

1. The agents' decision to open the footlocker, on probable cause to believe that it contained contraband, involves a fundamental but unresolved issue regarding the meaning of the Fourth Amendment. Simply put, the question here is whether portable containers such as footlockers and suitcases should be treated like dwellings or like automobiles for Fourth Amendment purposes. Stated more generally, the issue is whether probable cause searches of personal belongings seized outside the privacy of the home or office are presumptively unreasonable unless authorized by a warrant.

The court of appeals' holding that it was reasonable to seize the footlocker but unreasonable to search it without a warrant, although the officers had probable cause to believe that it contained contraband, exacerbates the confusion now reigning in the lower federal courts. The court of appeals recognized that it was taking a minority position and that other courts have adopted a variety of different approaches to the search of movable containers; the court concluded, however, that if standards applicable to one class of objects (automobiles) are to be applied "to an entirely different class of objects," this Court

should make the judgment (*id.* at 18a-19a). This Court should accept the invitation of the court of appeals to resolve this problem.

2. This case raises once again an issue that has sparked the "conflict that has been so notable in this Court's attempts over a hundred years to develop a coherent body of Fourth Amendment law" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 474). This conflict has been "caused by disagreement over the importance of requiring law enforcement officers to secure warrants" (*ibid.*). The underlying basis of that disagreement was summarized by Mr. Justice Stewart in *Coolidge* (*id.* at 474-475; footnotes omitted):

> Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."
>
> Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his

home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." As to other kinds of intrusions, however, there has been disagreement about the basic rules to be applied, as our cases concerning automobile searches, electronic surveillance, street searches and administrative searches make clear.

This case (unlike *Coolidge*) does not involve "a search or seizure carried out on a suspect's premises" and does not therefore implicate the "accepted * * * principle, that [such] a search or seizure * * * without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'" (*ibid.*). Rather, it involves the kind of search and seizure with regard to which there has been uncertainty and disagreement "about the basic rules to be applied" (*id.* at 475).

The decisions of the courts of appeals concerning the search of personal belongings seized on probable cause outside the home have reflected that disagreement. Some, like the court below, hold that the opening of a package is *per se* unreasonable unless

authorized by a warrant.[4] Others have adopted the rule that probable cause alone is sufficient to justify the search of a personal belonging that has been properly seized.[5] Some adopt a presumptive warrant requirement, but relax that requirement when the package is seized from a vehicle[6] or when the package is seized at the time of arrest, whether or not the package is within the scope of the area for search incident to arrest delineated in *Chimel* v. *California*, 395 U.S. 752.[7] And still other courts appear to dis-

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[4] See, *e.g.*, *United States* v. *Garay*, 477 F.2d 1306, 1308 (C.A. 5); *United States* v. *Anderson*, 500 F.2d 1311, 1317-1318 (C.A. 5); *United States* v. *Lonabaugh*, 494 F.2d 1257 (C.A. 5). Cf. *United States* v. *Hand*, 516 F.2d 472, 476, n. 10 (C.A. 5) (*en banc*).

[5] See, *e.g.*, *United States* v. *Wilson*, 524 F.2d 595, 598-599 (C.A. 8), certiorari denied, No. 75-5884, March 1, 1976; *United States* v. *Buckhanon*, 505 F.2d 1079, 1082 (C.A. 8); *United States* v. *Valen*, 479 F.2d 467 (C.A. 3), certiorari denied, 419 U.S. 901; *United States* v. *Johnson*, 467 F.2d 630, 639 (C.A. 2), certiorari denied *sub nom. White* v. *United States*, 410 U.S. 932; *United States* v. *Mehciz*, 437 F.2d 145 (C.A. 9), certiorari denied, 402 U.S. 974 (although this case involves a suitcase seized at the time of arrest, the court announced a rule under which arrest would be irrelevant).

Several state courts have reached the same result. *People* v. *McKinnon*, 7 Cal. 3d 899, 500 P.2d 1097; *Waugh* v. *State*, 20 Md. App. 682, 318 A.2d 204, reversed on other grounds, 275 Md. 22, 338 A.2d 268; *Chaires* v. *State*, 480 S.W.2d 196 (Ct. Crim. App. Texas); *State* v. *Wolfe*, 5 Wash. App. 153.

[6] See, *e.g.*, *United States* v. *Soriano*, 497 F.2d 147 (C.A. 5) (*en banc*).

[7] See, *e.g.*, *United States* v. *Battle*, 510 F.2d 776, 778-779 (C.A.D.C.); *United States* v. *Kaye*, 492 F.2d 744, 746 (C.A. 6); *United States* v. *Ciotti*, 469 F.2d 1204 (C.A. 3), vacated on other grounds, 414 U.S. 1151; *United States* v. *Maynard*,

tinguish "small" packages from "large" packages, applying a presumptive warrant requirement only to the latter.[8]

This profusion of what appear to be arbitrary distinctions fully justifies Judge Thomsen's description of the law as a "thicket through which state and federal judges, as well as state and federal law enforcement officers, must struggle in cases such as this" (App. A, *infra*, p. 29a). There is no reason why officers must be required to cope with such inscrutable mysteries when dealing with the mundane matter of what to do with properly seized packages. This is a problem arising often in law enforcement, and the difficulties are real; we believe that the Court should address the problem here.

3. Our submission is that there is no support in the history or language of the Fourth Amendment

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439 F.2d 1086 (C.A. 9); *United States ex rel. Muhammad* v. *Mancusi*, 432 F.2d 1046 (C.A. 2), certiorari denied, 402 U.S. 911; *United States* v. *Robbins*, 424 F.2d 57 (C.A. 6), certiorari denied, 402 U.S. 985. These cases do not, by and large, require separate probable cause to believe that the package contains contraband or evidence.

[8] See, *e.g.*, *United States* v. *Eatherton*, 519 F.2d 603 (C.A. 1); *United States* v. *Micheli*, 487 F.2d 429, 431 (C.A. 1). As these cases indicate, the First Circuit's own attempt to establish a coherent rule for package searches has been unsuccessful. The court of appeals could articulate no principled difference between the footlocker search here and the search of a briefcase upheld in *Eatherton*. The result, to use the court's own words (App. A, *infra*, p. 15a), is a "'gossamer thin' distinction which arresting officers could find impracticable, if not impossible, to follow * * *."

for the view that every search or seizure—regardless of the nature of the privacy interest at stake—is presumptively invalid where a warrant could have been but was not obtained. In making this argument, we are not disputing what "is by now axiomatic that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause'" (*Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (Powell, J., concurring)), nor are we denying that both the concept of probable cause and the presence or absence of a warrant are to be considered as bearing on the reasonableness of a search. Rather we submit that whether a search or seizure without a warrant should be deemed presumptively unreasonable depends on a determination whether the privacy interest at stake is of such magnitude that the interposition of a neutral and detached magistrate should be required to make the probable cause determination.

The classic example of a presumptively unreasonable search is one involving the warrantless entry into a home. But the footlocker here had been removed from the home and transported across country in the baggage compartment of a train. Respondents' expectations of privacy in it were surely no greater than their expectations of privacy in the contents of a car.

This Court has held that once a car has been properly seized, its interior can be searched without a warrant, even if a delay intervenes. *Cham-*

bers v. *Maroney*, 399 U.S. 42; *Texas* v. *White*, 423 U.S. 67. The reason for this rule can be traced to the diminished expectation of privacy that attends belongings willingly taken outside the house or office. It also is supported by the fact that a car is readily movable. And, finally, it is supported by the difficulty a court must face in determining the relative intrusiveness of immobilization and search.

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser' intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. [*Chambers* v. *Maroney*, *supra*, 399 U.S. at 51-52.]

All of these considerations apply to footlockers and other items of portable personal property no less than to automobiles.[9]

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[9] *Chambers* drew guidance from prior decisions involving automobiles, beginning with *Carroll* v. *United States*, 267 U.S. 132. In one of those cases, *Preston* v. *United States*, 376 U.S. 364, the Court stated: "Common sense dictates, of course, that

The court of appeals, while acknowledging that "baggage or goods in transit present some of the same characteristics as automobiles" (App. A, *infra*, p. 17a), declined to follow this reasoning to its conclusion. It attempted to distinguish the package cases in other circuits by arguing that they involved "hand-carried briefcases and other luggage" (*id.* at 13a)

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questions involving searches of motorcars or *other things readily moved* cannot be treated as identical to questions arising out of searches of fixed structures like houses" (*id.* at 366; emphasis added). On the other hand, in *Coolidge* v. *New Hampshire*, 403 U.S. 443, Mr. Justice Stewart, speaking for a plurality of the Court, observed that if *Carroll* and its progeny permit "a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to arrest, then it would permit as well a warrantless search of a suitcase or a box. We have found no case that suggests such an extension of *Carroll*" (*id.* at 461, n. 18). The *Coolidge* plurality was reluctant to extend the principles of *Carroll* to a search of an automobile (or other container) "on private property." See also *Rios* v. *United States*, 364 U.S. 253, 261, in which the Court, apparently without detailed consideration of the problem, articulated a presumptive warrant requirement for a package seizure and search without probable cause. On the other hand, in *Draper* v. *United States*, 358 U.S. 307, 314, the Court without detailed consideration upheld the warrantless opening of luggage seized at the time of an arrest.

In *Nugent* v. *United States*, 409 U.S. 1065, three Justices dissented from the denial of a writ of certiorari in a case that presented the issue whether police could search, with probable cause but without a warrant, a trunk found in the basement of an apartment building which they had entered with the landlord's consent. It is apparent, then, that the Court has not yet chosen an occasion explicitly to consider the application of *Carroll* and its progeny to the search of containers other than automobiles.

that clearly was movable, while the footlocker in this case "was far from portable, and too heavy even to be carried by the average person" (*id.* at 15a). But this cannot be persuasive, for a car, once seized (as in *Texas* v. *White*, *supra*), loses the mobility that may have justified the seizure; the Court still has upheld subsequent searches. And all of the other baggage search cases involve packages that had been reduced to the officers' possession before being opened.

4. The court of appeals, in our view, gave insufficient consideration to the combined weight of three factors: the nature of the property searched by the agents, the fact that the property was in the agents' lawful possession at the time of the search, and the fact that a "serious personal intrusion" (*United States* v. *Watson*, No. 74-538, decided January 26, 1976, concurring, slip op. 4 (Mr. Justice Powell)) into respondents' privacy already had occurred because of their arrest prior to the search.

The agents did not search a home, a place of business, or similar area, those places for which a warrant historically has been required. Nor did they search personal effects that could be found only by entering private premises (*Coolidge* v. *New Hampshire*, *supra*; see *Cady* v. *Dombrowski*, 413 U.S. 433, 446-447). Nor, lastly, was the search an invasion of a person's private thoughts or communications, as to which the locus of the intrusion may

fairly be deemed irrelevant (*Katz* v. *United States*, 389 U.S. 347).[10]

The agents searched a container of personal possessions that they encountered outside the privacy of the home and in circumstances recognized by the court of appeals to justify their seizing it forthwith.[11] Cf. 21 U.S.C. 881. Once that lawful intrusion had occurred, respondents' privacy interest in the contents of the footlocker had diminished to the point that a further intrusion, on probable cause, did not require the pre-search interposition of a magistrate. Indeed, as this Court recognized in *Chambers* v. *Maroney*, *supra*, to require a search warrant in such circumstances would be to demand precise and wholly unworkable calculations as to what constitutes the "greater" and what the "lesser" intrusion.

Respondents' privacy interest in their personal effects was further diminished by the fact that they

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[10] Likewise, it was not a search of a letter or package sent by first-class mail (*United States* v. *Van Leeuwen*, 397 U.S. 249). Because "'the use of the mails is almost as much a part of free speech as the right to use our tongues'" (*id.* at 251, quoting *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407, 437 (Holmes, J., dissenting)), the Court has held that such letters and packages "are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles" (*Ex parte Jackson*, 96 U.S. 727, 733).

[11] The privacy interest of respondents was especially slight here because the agents had probable cause to believe that the footlocker contained nothing but contraband. In other words, they had probable cause to believe that there were *no* legitimate privacy interests in the contents of the footlocker.

were under lawful arrest at the time of the search.[12] As Mr. Justice Powell observed in *United States* v. *Robinson*, 414 U.S. 218, 237-238, "a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest" (footnotes omitted). See also *United States* v. *Edwards*, 415 U.S. 800, 808-809, which emphasized the reduced privacy interest that an arrestee retains in his effects and approves the statement of a lower court that " '[w]hile the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.' " [13]

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[12] This argument does not apply to respondent Chadwick, if the court of appeals was correct in concluding that his arrest lacked probable cause.

[13] This was particularly so, the Court held, "in view of the existence of probable cause linking the clothes [removed from the defendant] to the crime" for which he had been arrested (*id.* at 806). Similarly, in *Cooper* v. *California*, 386 U.S. 58, 61, the Court upheld the search of a defendant's car a week after his arrest, noting that the search "was closely related to the reason petitioner was arrested * * *." Here, too, the search of the footlocker was "closely related" to the reason respondents were arrested. In these circumstances, the abatement of their privacy interest effected by their arrest also encompassed the opening of the footlocker.

In sum, given the nature of the property searched, the lawful seizure of that property, respondents' arrests, and the existence of probable cause to believe that the footlocker contained contraband, it was reasonable for the agents to open it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 75-1165

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH A. CHADWICK, ET AL.,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*, CAMPBELL, *Circuit Judge*, THOMSON,* *Senior District Judge*

March 29, 1976

CAMPBELL, *Circuit Judge.* The United States has appealed under 18 U.S.C. § 3731 from the district court's allowance of motions to suppress evidence.

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* From the District of Maryland, sitting by designation.

Chadwick, Machado, and Leary, following their arrest on May 10, 1973, were indicated for possession of marijuana with intent to distribute and for conspiracy. 21 U.S.C. §§ 841(a)(1) and 846. Prior to their trial, they moved to suppress evidence of marijuana seized from a footlocker, two suitcases and Chadwick's person, and Chadwick's remarks while in custody. After an evidentiary hearing, the district court ruled in the defendants' favor, 393 F. Supp. 763, and it reaffirmed and amplified its rulings after hearing the Government's motion for reconsideration. *Id.* at 773. This appeal followed.

The circumstances of defendants' arrests and the subsequent searches were described by federal agents Richard G. Christopher and Paul L. LaVoie, both assigned to the Office for Drug Abuse Law Enforcement (ODALE), and by Robert Walsh, police officer for Penn Central Railroad. On May 8, 1973, information was relayed to LaVoie in Boston from the ODALE office in San Diego, California, that an old brown trunk or footlocker, suspected to contain marijuana, was en route from California to Boston by Amtrak train. The San Diego office had been tipped off by an Amtrak official, who suspected that the footlocker contained marijuana because it was leaking talcum powder, a material used to cover up the odor of controlled substances, and because of its unusual weight for its size, almost two hundred pounds. The appearance of the person shipping the footlocker, identified as Machado, fit a profile used by Amtrak officials to spot drug traffickers. The tag bore Ma-

chado's address in Scituate, Massachusetts. According to ticketing information, he was accompanied by another person later identified as Leary.

Descriptions of both Machado and the footlocker were transmitted to the Boston agents who learned that the train would arrive in Boston the evening of May 10. Between the eighth and the tenth, the agents sought no search or arrest warrants, but continued investigating. When the train passed through New Haven, Connecticut, prior to its arrival in Boston, Amtrak officials checked the baggage compartment and verified that the footlocker was still on board. Agent Christopher testified that "the suspicion was sufficient to justify an expenditure of men and energy at South Station," and so six law enforcement officials were gathered at South Station at 6:50 p.m. on May 10 to await the train. It finally arrived at 8:50 p.m., approximately one hour behind schedule. A few minutes later, Agent Christopher spotted a suspect fitting Machado's description inside the terminal. Christopher saw Machado make a telephone call but was unable to see the number which was dialed or overhear the conversation. Agent Christopher also saw the footlocker as it was removed from the baggage car, placed on a baggage cart, and taken in to the station area, where it was claimed by Machado and a female companion, later identified as Leary. They placed it on the floor near an abandoned magazine stand and sat down on it. Agent Christopher never saw the trunk open. The couple also had with them two suitcases.

The agents had brought with them Duke, a detector dog, trained to sniff out controlled substances. Duke's handler walked him on his leash by Machado and Leary several times. Agent Christopher then told the handler to release Duke near the footlocker, whereupon Duke went to the locker and gave an "alert response" by scratching on it, indicating that he detected a controlled substance inside. The handler had not been instructed, however, to have Duke also smell the suitcases, and so immediately after the alert to the footlocker, he picked up Duke's leash and walked Duke out of the building.

Chadwick was seen for the first time a few minutes later walking into the terminal. He came over to Machado and Leary and the three engaged in conversation for a moment. Chadwick then left the terminal [1] and went outside to the street where a Dodge Polara, later found to have been rented, was parked. Machado and Leary engaged a red cap who physically transported the footlocker out to the car where Chadwick was waiting. Leary climbed into the front passenger seat, putting one of the suitcases inside the passenger compartment. The red cap loaded the footlocker into the trunk of the Dodge with the help of Machado and Chadwick, the red cap doing most of the lifting. The other suitcase was placed in the trunk of the Dodge with the footlocker.

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[1] The district court found that the three "engaged in brief conversation after which they all left the station with a railroad porter." However, it is clear from Agent Christopher's testimony that Chadwick left the terminal alone, before Machado, Leary, and the luggage.

As soon as the red cap was clear of the vehicle, before the trunk lid was closed or the car engine started, the federal agents closed in and arrested the trio. It was then about 9:15. Machado and Chadwick were standing at the back of the vehicle; Leary was seated in the front seat. The two males were quickly frisked and all three were handcuffed. No guns or weapons were found on any of them. Keys to the footlocker and receipts and documents of ownership were found on Machado, but no keys or documents were found on Chadwick so as to link him to the footlocker. A key was found on Chadwick's person, of which a duplicate or similar type was found in Leary's possession; it was believed to be a safe deposit box key, not a trunk key. They were all then taken in government vehicles, Chadwick and Machado in one and Leary in another, to the John F. Kennedy Building (JFK). The Dodge Polara was seized for the purpose of forfeiture because of its use to facilitate the transportation of marijuana, 21 U.S.C. § 881. One of the agents drove it to JFK at the same time, the footlocker and suitcases still inside. Subsequent to the arrest, Agent Christopher testified, the footlocker was under his control at all times. No accomplices were suspected or known to be in the area.

En route to JFK, a five minute trip, Officer Walsh read to Chadwick and Machado their *Miranda* rights. Agent Christopher repeated the warnings and asked Chadwick point by point if he understood those rights and that he could waive those rights. Chadwick ac-

knowledged that he understood that he could waive them. He was not requested to execute a waiver and there is no evidence that he did so. Machado refused to give his name or answer any questions. There was then a brief exchange between Agent Christopher and Chadwick. As Agent Christopher recounted the conversation:

> "I asked the defendant Mr. Chadwick his name, and he gave it to me.
>
> I asked the defendant Machado his name, and he refused to answer.
>
> I then asked Mr. Chadwick how it came to be that he was—where he was from? And he said, Salem, New Hampshire.
>
> I asked him why he was all the way down here from Salem, New Hampshire? And he said that Mr. Machado had called him.
>
> He asked me how I knew what was in the trunk. And I told him that he had it wrong; I asked the questions.
>
> I asked him how he knew what was in the trunk, and he didn't answer. He said he didn't know what was in the trunk.
>
> I asked him what his phone number was.
>
> He said he didn't have a phone.
>
> Then I asked him how he could get a call from Mr. Machado?
>
> He said that everything that he said I was twisting, and he didn't care to answer any more questions."

Chadwick said nothing further. After they arrived at JFK, Agent Christopher put Chadwick through

routine booking information. *Miranda* warnings were repeated and there was further conversation:

> "I took routine booking information—name, address, and so on.
>
> At that time Mr. Chadwick stated that he lived, I think it was 100 Riverway in Brookline or near Boston. I don't recall if it was Brookline or not.
>
> I again asked him for his phone number at that address. He said he had no phone.
>
> I asked him how he got the phone call from Mr. Machado. He said he received it on the phone of a friend who lived in the apartment above him at 100 Riverway, that would be the third floor apartment.
>
> And I believe I asked him how he knew to be at that phone at that particular time to receive a call. I don't believe he responded to that question.
>
> I don't think there were any other questions other than booking information asked of him."

A small quantity of marijuana was found on Chadwick's person.

The footlocker and suitcases were taken into the ODALE office at JFK within minutes of the prisoners' arrival. The footlocker was double-locked with a padlock and regular trunk latch, which the agents first noticed when they removed it from the Dodge Polara at JFK. It was opened in the ODALE office by the agents, using the keys found on Machado, sometime between 9:30 and 11:00 p.m. A large quantity of marijuana was found inside. Agent Chris-

topher testified that the search was delayed until they reached JFK because there were too many people on the street at South Station when the arrest was made. The two suitcases were also brought into the ODALE office for inventory pursuant to Drug Enforcement Administration regulations. The agents did not suspect that they contained marijuana. Both suitcases were locked; none of the defendants claimed ownership or produced keys, and permission to open the suitcases was not sought or obtained from any of them. The agent in charge broke the suitcases open. Marijuana was found inside both. No inventory list of their contents was offered into evidence, nor was there evidence that one was prepared.

No search warrants were ever secured for either the footlocker or the suitcases.

Warrantless Search of Footlocker

The warrantless footlocker search was made at the ODALE office an hour or so after defendants were arrested and the footlocker seized. At the time of the search, the agents had without doubt probable cause to believe there was a controlled substance therein. They did not, however, possess a search warrant. The question, therefore, is whether their warrantless search fits within one of the exceptions to the constitutional requirement of a warrant, for, as the Supreme Court has said, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few

specially established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967), *quoted in Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971); *United States* v. *Watson*, 44 U.S. L.W. 4112, 4116, 4117 (U.S. Jan. 26, 1976) (Powell, J., concurring). The burden, moreover, "is on those seeking the exemption to show the need for it." *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951).

At the first suppression hearing, the Government sought to justify the warrantless search of the footlocker under the so-called automobile exception. *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925); *see Texas* v. *White*, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975). It argued that as the vehicle itself could have been searched without a warrant, so also could the footlocker, as part of its contents. *See United States* v. *Tramunti*, 513 F.2d 1087, 1104-05 (2d Cir. 1975); *United States* v. *Soriano*, 497 F.2d 147 (5th Cir. 1974) (en banc). But the district court, *Acm.* [*sic*] *Coolidge* v. *New Hampshire*, *supra*, at 461-62 (Stewart, J.), to the effect that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears," held that "there was no nexus between the search and the automobile, merely a coincidence." It pointed out that the agents had monitored the progress of the porter and defendants as they moved the footlocker from the station to the vehicle. The arrest and seizure occurred just after the footlocker had been deposited in the parked car's trunk. The trunk lid was still open,

the driver was not yet at the wheel, and the motor had not yet been started. "Under the circumstances," said the court, "the floor of the autmobile was nothing more than a platform or resting place for the footlocker." We agree. No reason comes to mind why the footlocker's placement in the car trunk should make it any more searchable than if the arrest had occurred in the station area. *See Coolidge* v. *New Hampshire*, *supra*.

Upon petitioning the district court for reconsideration, the Government no longer pressed the automobile exception, but rather turned to its present theory, that a warrantless search of the footlocker was permitted "incident" to the arrest of its owner (Machado),[2] and that such a search was therefore lawful when conducted a short time later at the ODALE office. *See United States* v. *Edwards*, 415 U.S. 800, 803 (1974) ("searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention"). *But see Preston* v. *United States*, 376 U.S. 364, 367 (1964).

The district court found the Government's new theory unpersuasive. The court held that the footlocker could not have been searched incident to the

[2] Machado does not contest the lawfulness of his arrest, and we have no doubt that the agents had probable cause to arrest him and could do so without an arrest warrant. *United States* v. *Watson*, 44 U.S.L.W. 4112 (U.S. Jan. 26, 1976); *see United States* v. *Race*, No. 75-1169 (1st Cir., Jan. 30, 1976).

arrest as it was then outside the area of defendants' immediate control. The court relied on *Chimel* v. *California*, 395 U.S. 752 (1969), which restricts a warrantless search incident to an arrest to the arrestee's person and the area "within his immediate control," meaning "the area from which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The court found that a "double-locked, two hundred pound container" that had already been placed in the open trunk of the automobile at the time of the arrest was not an "area within his immediate control"; and as the search of the locker could not be justified as a search incident to the arrest had it taken place contemporaneously with the arrest, the later search was illegal a *fortiori*. 393 F. Supp. at 375 & n.4.

The Government now contends (1) that the district court erred in relying on *Chimel*, and (2) that the footlocker was within defendants' control at the time of arrest, even under *Chimel*.

As to the first point, the Government stresses that *Chimel* involved the search of a house, and points to language in *Weeks* v. *United States*, 232 U.S. 383 (1914), and in this court's decision in *United States* v. *DeLeo*, 422 F.2d 487, 492, *cert. denied*, 397 U.S. 1037 (1970), as evidencing a special concern for the sanctity of the home; consequently, it argues, the stringent standards enunciated in *Chimel* are applicable only to a search of a dwelling. The Government would have [us] to test the legality of a

warrantless search incident to an arrest outside of a dwelling under a standard of "reasonableness."

However, the *Chimel* formulation, limiting an incident-to-arrest search to the person and to the area within the arrestee's control, has recently been repeated with approval in a case that did not involve a building search. *United States* v. *Robinson*, 414 U.S. 218, 225-26 (1973). Nor is its rationale, to prevent access to weapons and destructible evidence, suited only to houses. Courts have applied it in situations analogous to this. *See United States* v. *Rothman*, 492 F.2d 1260, 1265-66 (9th Cir. 1973); *United States* v. *Colbert*, 454 F.2d 801 (5th Cir. 1972), *rev'd on other grounds*, 474 F.2d 174 (1973) (en banc). And, of course, the fourth amendment itself is not limited to dwellings.[3] *See, e.g., United States* v. *Van Leeuwen*, 397 U.S. 249 (1970) (first-class mail search); *Rios* v. *United States*, 364 U.S. 253 (1960) (package search).

Thus we find *Chimel* relevant, and, indeed, we know of no decision of the Supreme Court that is more relevant to the arrest situation presented here.[4]

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[3] The fourth amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[4] This is, of course, not to say that the Supreme Court might never relax the "immediate control" test in the baggage search area, by reinterpretation or otherwise. But it would be speculation, and perhaps even presumption, for us to initiate such a change. Even assuming that greater flexibility is desirable to accommodate searches for contraband, it is debatable whether the arrest exception would be the best vehicle to accomplish this. *See infra.* The arrest exception does not require probable cause to search, and if the mere fact of arrest were to allow an unlimited baggage search, it might be feared that people would be arrested on technicalities in order to search all their belongings. We take no position on the matter but feel, in any event, that revisions of this sort are best left to the high Court.

Moreover, in the area of criminal investigatory searches at least, the Supreme Court has not clearly signalled any retreat from the requirement that warrantless searches be confined to "well-delineated exceptions"—such as the arrest exception. *Katz* v. *United States, supra.* The requirement, coupled with the Court's explicit rejection in *Chimel* of the more flexible guidelines prevailing in the pre-*Chimel* era, *see, e.g., United States* v. *Rabinowitz*, 339 U.S. 66 (1950), rules out our adopting the Government's proposed "reasonableness" approach. The question before us is simply whether the search falls within the boundaries of the particular exception.

Applying *Chimel*, we find no error in the lower court's decision that the footlocker was not an area within the arrestee's immediate control. In so holding, the district court rejected the Government's attempt to analogize the footlocker search to that of hand-carried briefcases and other luggage, searches of which various Courts have approved. *See Draper* v. *United States*, 358 U.S. 307 (1959); *United States* v. *Buckhanon*, 505 F.2d 1079, 1082 (8th Cir.

1974); *United States* v. *Maynard*, 439 F.2d 1086 (9th Cir. 1971); *United States* v. *Mehciz*, 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971); *United States ex rel. Muhammad* v. *Mancusi*, 432 F.2d 1046 (2d Cir.), *cert. denied*, 402 U.S. 911 (1970). The district court said,

> ". . . In all of these cases, the luggage that was searched was being carried by the defendant at the time of his arrest. It may be that hand-carried luggage is encompassed in the phrase 'area within his immediate control.' But the footlocker in this case was not hand-carried luggage. . . ."

Since the decision below, this circuit has also upheld a warrantless search of a hand-carried briefcase at the scene of the arrest, after the arrestee was handcuffed and in custody. *United States* v. *Eatherton*, 519 F.2d 603, 610-11 (1975). However, we must agree with the district court that there is a considerable difference between items such as Eatherton's hand-carried briefcase and the footlocker here. Portable objects in hand such as zipper bags, briefcases and small suitcases, fit without too much difficulty into *Chimel's* "immediate control" standard. Their size, accessibility, and portability all liken them to "personal effects" [5] found on an arrestee's person, such as clothing or a cigarette package in one's pock-

[5] In another setting, Chief Judge Coffin has described a briefcase as a "personal effect" that "does not clearly fall either within the realm of a personal search or a search of the premises." *United States* v. *Micheli*, 487 F.2d 429, 431 (1st Cir. 1973).

et, which may lawfully be searched without a warrant as incident to an arrest. *See United States* v. *Robinson, supra; United States* v. *Edwards, supra.* To exclude searches of such items can create "gossamer thin" distinctions which arresting officers could find impracticable, if not impossible, to follow; and, where the justification for a search depends to a great extent on the reasonable judgments which the arresting officers could have made at the time of arrest, *see United States* v. *Robinson, supra*, those distinctions would appear unwarranted.

However, a two hundred pound footlocker is quite different. It is difficult to liken this footlocker to a hand-carried bag and say in any meaningful sense that the footlocker or, more importantly, its contents, were under defendants' immediate control. It was far from portable, and too heavy even to be carried by the average person. It had also, as the agents well knew, just been unloaded from a train's baggage car after a cross-country trip suggesting, as proved to be the case, that it was tightly secured and could not be opened; nor did the agents observe it open before they themselves opened it. We thus see no basis for disturbing the court's finding that, for purposes of the *Chimel* standard, "this footlocker was simply not within the control of the defendants at the time of arrest." [6]

[6] This is not to say that even a bulky footlocker could never be such an area if, for example, there was reason for the

While, as noted, we understand the Government to be relying on the search-incident-to-arrest exception, part of its argument suggests that it may also be looking in the direction of liberalized luggage search rules approved in several other circuits. These, while arising in an arrest context, draw heavily upon the rationale underlying the automobile search exception in *Chambers* v. *Maroney, supra. United States* v. *Mehciz, supra; United States* v. *Wilson*, No. 75-1247 (8th Cir., Oct. 21, 1975); *United States* v. *Buckhanon, supra; see United States* v. *Johnson*, 467 F.2d 630, 639 & n.8 (2d Cir. 1972), *cert. denied*, 410 U.S. 932, 413 U.S. 920 (1973). The courts in question would apparently allow the warrantless search of luggage for contraband upon the individual officer's determination of probable cause.[7]

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arresting officers to believe that the arrestee had immediate access to its contents. The district court's findings on this score, are, of course, entitled to much weight.

In holding that the footlocker search was not within the arrest exception, we do not, as the dissent would indicate, question the validity of Machado's arrest, nor do we get into any question of whether the search was unduly delayed. We simply hold that the footlocker was beyond the "area of control" that is searchable without a warrant incident to an arrest.

[7] The scope and basis for the novel exception, beyond an analogy to *Chambers*, are barely spelled out in any of the cited cases. One reason that we hesitate to follow such cases is that they present no clear view of the principles to be applied.

It will be remembered that in *Chambers* v. *Maroney, supra*, the Court reaffirmed an established exception, first announced in *Carroll* v. *United States, supra*, allowing the warrantless search of a moving vehicle which officers had probable cause to believe held contraband. The rationale for the *Carroll* and *Chambers* exception was the likelihood that the vehicle would escape before a warrant could be secured. *Chambers* took *Carroll* a step further by allowing not only an immediate on-the-spot search but a later warrantless police station search, sinc the Court reasoned, immobilization of the vehicle until a warrant could be secured was not necessarily a lesser intrusion than a warrantless search, *id.* at 51-52.

Admittedly baggage or goods in transit present some of the same characteristics as automobiles. Unless immobilized, such items may disappear before a warrant is obtained, and immobilization (a step which most courts, including ourselves, will permit, given cause), is arguably just as annoying to the owner as a search. But whatever can be said for this theory, we do not believe that it has received sufficient recognition by the Supreme Court outside the automobile area, or generally, for us to recognize it as a valid exception to the fourth amendment warrant requirement. Baggage predated automobiles, yet *Carroll* and its progeny do not mention baggage as a separate category comparable to vehicles. As we have already noted, exceptions to the warrant rule have

been termed "specially established" and "well-delineated". *United States* v. *Katz*, *supra*.[8] The would-be exception in question hardly fits that description. And we cannot be sure that the intrusion of searching an item of baggage is no greater than detaining it. As to first-class mail, the Supreme Court has held that it is greater. *United States* v. *Van Leeuwen*, *supra*. Certainly such an exception could have considerable impact, as its premises might seem to apply not only to baggage but to mail, express packages, and moving freight of all description. The *Chambers* automobile search exception itself is of a somewhat broader character than other exceptions; it does not, for example, require an accompanying arrest. The fourth amendment is "something less than a seamless web," *Cady* v. *Dombrowski*, 413 U.S. 433, 440 (1973). Standards applicable to one particular exception may not be readily translatable into another. If an exception of this character is to be translated to an entirely different class of objects,

[8] Justice Powell has recently underscored this proposition, stating that "[t]here is no more basic constitutional rule in the Fourth Amendment area than that which makes a warrantless search unreasonable except in a few 'jealously and carefully drawn' exceptional circumstances." *United States* v. *Watson*, 44 U.S.L.W. 4112, 4117 (U.S. Jan. 26, 1976) (concurring), *quoting Jones* v. *United States*, 357 U.S. 493, 499 (1958). This rule is quite different from the more expansive principles applicable to warrantless arrests, which, e.g., allow a police officer to arrest solely on probable cause and without a warrant someone who has committed a felony. *Id.*

we think the Supreme Court should make the judgment.

We are constrained to agree, therefore, with the district court that the warrantless search of the footlocker did not fall within any recognized exception to the general warrant requirement, and that therefore the search was in violation of the fourth amendment. We would add that there was no special exigency justifying a warrantless search under the circumstances, *see United States* v. *Johnson*, 333 U.S. 10, 14 (1948). The Government does not argue that there was. The district court found that the footlocker "was not in imminent or even potential danger of being destroyed or spirited away." Doubtless, the agents had the power to detain the footlocker temporarily at their office or otherwise until a warrant could be procured. *See United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-82 (1974); *United States* v. *Van Leeuwen*, *supra*, at 252; *Terry* v. *Ohio*, 392 U.S. 1, 16-19 (1968).[9] But they were not empowered to search it.

We affirm the district court's order supressing the contents of the locker.

[9] Government agents are given power by statute to seize contraband, 21 U.S.C. § 881. Without deciding how this statutory authority meshes with the fourth amendment warrant requirement and its exceptions, *see, e.g.*, 21 U.S.C. § 881 (b) (1), it reinforces the agents' power to detain baggage at least temporarily. The Government does not contend, however, that the agents' powers under 21 U.S.C. § 881 gave them any greater authority to search than would exist under normal fourth amendment principles.

Warrantless Search of the Suitcases

The government does not argue that in breaking open the two locked suitcases and searching them, the agents were acting pursuant to the search-incident-to-arrest exception. The district court specifically found that the suitcases were outside defendants' control at the time of arrest, and we agree.

The Government argues only that regulations of the Drug Enforcement Administration,[10] as interpreted by the agency, "mandate a complete inventory of the personal belongings of the arrested person," and that compliance with such regulations was reasonable and not in violation of the fourth amendment. The district court found to the contrary. It considered the reasons advanced for the inventory—safeguarding the arrestee's personal property, insulating the agents from later claims or theft of lost property, and institutional safety—and then found,

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[10] Agents Manual, ¶ 6662.25. Collection and Handling of Other Personal Property:

Personal property of non-evidentiary value which is found in a seized automobile will be handled as outlined in ¶ 6654.23.

Agents Manual, ¶ 6654.23. Seizure Procedures:

Upon seizing the vehicle, it must be thoroughly searched. A search performed pursuant to civil seizure need not be contemporaneous with an arrest, and no search warrant is necessary. Remove all articles from the vehicle which are not part of the vehicle itself.

Personal property in the vehicle should be returned to the owner or the person from whom the vehicle was seized, and a receipt obtained.

"None of these considerations is available to justify as inventory searches the breaking into these suitcases. It is simply not credible to suggest that a closed, locked suitcase posed a threat to the institutional safety. . . . No more credible is the theory . . . that the search was necessary to protect the agents from later claims of theft or lost property. It is difficult to see how the integrity of agents is safeguarded by picking the lock to a suitcase. Such forcible entry would likely invite more, rather than fewer, claims of theft. Breaking open the suitcases (the description used by the agent who testified) was an unreasonable and, therefore, unacceptable approach to the problem."

The Supreme Court has not attempted to define generally the conditions in which inventory searches are consistent with the fourth amendment. *See Harris* v. *United States*, 390 U.S. 234 (1968). In inquiring into the reasonableness of the Government's actions in this case, and weighing the privacy rights of the defendants against the Government's interest in doing what it did, the court followed the approach of the eighth circuit in *United States* v. *Lawson*, 487 F.2d 468 (1973), and the California State courts, *see Mozzetti* v. *Superior Court of Sacramento County*, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). That approach is somewhat at variance with the tenor of decisions in the fifth circuit which tend to validate "routine" inventory procedures unless shown to be carried out in particularly bad faith. *See, e.g., United States* v. *Kele-*

har, 470 F.2d 176 (1972); *United States* v. *Lipscomb*, 435 F.2d 795 (1970), *cert. denied*, 401 U.S. 980 (1971).

We agree generally with the approach taken in *Lawson* and find no reason to overturn the findings below. This is not to dispute the propriety of reasonable inventory procedures designed to safeguard clothing and personal effects; and if in the course of such reasonable good faith efforts an officer stumbles across incriminating evidence, the evidence will not be suppressed. *See Cady* v. *Dombrowski*, *supra; Fagundes* v. *United States*, 340 F.2d 673, 675-76 (1st Cir. 1965); *cf. Cabbler* v. *Superintendent*, 18 Cr L 2314 (4th Cir. Dec. 8, 1975). But just because of its designation as such, an inventory is not immune from the fourth amendment. *United States* v. *Lawson*, *supra*, 471-72. We see an inventory as occupying a middle ground between a criminal investigatory search, which must comply strictly with warrant and probable cause standards, and those actions which fall totally outside the fourth amendment. *See, e.g., Harris* v. *United States*, *supra; Fagundes* v. *United States*, *supra*. Like the search of a code inspector, an inventory may be initiated and carried on upon a less formal basis than a criminal search and will be upheld so long as it serves a proper governmental purpose and does not amount to an excessive intrusion. *Cf. Camera* v. *Municipal Court*, 387 U.S. 523 (1967). The test is reasonableness, and when, as here, there is a dispute, all the facts must be examined. We intimate

no judgment as to the propriety of inventorying unlocked suitcases, nor even locked ones given sufficient reasons, such as suspicion that there may be explosives inside. But breaking open the two locked suitcases here was an unreasonable intrusion that exceeded any proper governmental interest shown to exist. As the court below pointed out, to protect the agents from the later claims, the suitcases could have been sealed with tape which the agents could have initialled, or placed in a locked storeroom with the keys kept in an envelope along with other personal property of defendants. Forcing the locks served no apparent purpose other than to satisfy the agent's curiosity.[11]

Suppression of Chadwick's Conversation with the Agent

The district court suppressed Chadwick's remarks made in response to Agent Christopher's questions a few minutes after Chadwick's arrest. Chadwick was then being driven by the arresting officers to the ODALE office. He had been advised of his Miranda rights, as the court found, but, as Agent Christopher himself testified, had not expressly in-

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[11] The court also found that defendant's permission to open the suitcases was not sought before the locks were picked, although Agent Christopher testified that none of them claimed ownership. Nor was an inventory list ever offered to defendants. The regulations relied on are also, at best, ambiguous as to the authority for such actions. Under the circumstances, the court was entitled to entertain doubts as to the motive behind breaking into the suitcases.

dicated that he waived his rights, by signing a form or otherwise. The court found (1) that Chadwick's arrest was illegal for lack of probable cause and (2) that his responses were "tainted" by the illegal arrest. On the last point, the court found that the Government had not proven a voluntary and knowing abandonment of rights, particularly as Chadwick was interrogated within a few short minutes after being illegally arrested. Relying on *Wong Sun* v. *United States*, 371 U.S. 471 (1963), it found the custodial interrogation to be inherently coercive "even as to one who is lawfully in custody," and even more so "where the initial arrest is illegal."

On whether there was probable cause to arrest Chadwick, we agree with the district court that there was not. That Chadwick arrived at the station to meet the other defendants and assisted in putting the footlocker in his rented car was suspicious but fell somewhat short of being "sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89 (1964). Chadwick could have been, as the district court found, a friend or relative who knew nothing of the contents of the footlocker. Association with known or suspected criminals does not, in and of itself, establish probable cause. *Sibron* v. *United States*, 392 U.S. 40 (1968); *United States* v. *DiRe*, 332 U.S. 581 (1948). In a case where the facts were similar but even more indicative of guilt, the ninth circuit found no probable cause to arrest. *United States* v. *Jit Sun Loo*, 478 F.2d 401 (1973).

See also United States v. *Linnear*, 464 F.2d 355 (9th Cir. 1972); *United States* v. *Bazinet*, 462 F.2d 982 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010.

The Government argues that because Chadwick momentarily "possessed" the footlocker, his knowing involvement in the marijuana offenses can be inferred from his possession. *United States* v. *Phillips*, 496 F.2d 1395 (5th Cir. 1974); *United States* v. *Bonham*, 477 F.2d 1137 (3rd Cir. 1973; *United States* v. *Palmer*, 467 F.2d 371 (D.C. Cir. 1972); *People* v. *Reisman*, 29 N.Y. 2d 278, 277 N.E.2d 396, 327 N.Y.S.2d 342 (1971); *People* v. *Nettles*, 23 Ill. 2d 306, 178 N.E.2d 361 (1961), *cert. denied*, 369 U.S. 853 (1962). The district court found that, at the time of arrest, Chadwick in fact exercised no "dominion or control" over the footlocker. His contact "was less than that of a porter." This may be an overstatement: the footlocker was put in the car, and the agents could infer that Chadwick was the driver of the car although Chadwick's appearance on the scene had been entirely unexpected. Still, Chadwick's possessory interest was so slight that one cannot fairly infer knowledge of the contents from that fact. *See Leary* v. *United States*, 395 U.S. 6, 36 (1969); *cf.* 9 Wigmore on Evidence § 2491, at 288 (3d ed. 1940).[12]

[12] *Cf. United States* v. *Race*, No. 75-1169 (1st Cir., Jan. 30, 1976) (sole possession of consignee of crate reasonably believed to contain contraband held sufficient to establish probable cause to arrest).

The Government contends that the agents could also rely for probable cause on their policeman's noses. An agent, to be sure, is an expert of sorts, and from certain facts he may be able to derive meaning that would elude an untrained or inexperienced person. But it is one thing to credit an agent's skilled interpretation of adequate facts, and another to credit the agent's suspicions simply because the agent is an agent. Good hunches are the foundation of good police work, but they are not probable cause. The case cited by the Government, *United States* v. *Kancso*, 252 F.2d 220 (3d Cir. 1958), and others, *United States* v. *Davis*, 458 F.2d 819 (D.C. Cir. 1972) and *Ortiz* v. *Craven*, 442 F.2d 418 (9th Cir. 1971), all presented a factual basis from which the trained observer could reasonably believe that the suspect had committed or was committing an offense. We affirm the ruling below that the arrest was illegal.

We also affirm the court's exclusion of Chadwick's remarks. *Wong Sun* was recently reaffirmed by *Brown* v. *Illinois*, 422 U.S. 590 (1975), and while the latter scarcely answers all the questions left after *Wong Sun*, it makes plain that *Miranda* warnings alone do not validate admissions secured following an illegal arrest. Here, as the district court found, the admissions were made a few short minutes after the arrest, a factor militating against admissibility, *id.* at 603.

It is true that weighing in the Government's favor is the relative innocuousness of the arrest: while

the agents should have known that they lacked probable cause, they had good reason to suspect Chadwick, and there is no evidence that they acted in bad faith. Still the error was not a mere technical infraction, such as Justice Powell described in his concurrence in *Brown* v. *Illinois*, as when officers rely on a warrant later invalidated. *Id.* at 611. Furthermore, the district court found that Chadwick did not effectively waive his *Miranda* rights, and that consequently his admissions were not themselves voluntary, *see Escobedo* v. *Illinois*, 378 U.S. 478, 490 n. 14 (1964), the "threshold requirement" of admissibility. 422 U.S. at 604. This finding was perhaps not compelled in the circumstances, but it was not clearly erroneous. *Leavitt* v. *Howard*, 462 F.2d 992, 996 (1st Cir.), *cert. denied*, 409 U.S. 884 (1972). Taken together, the court's findings amount to a supported determination that the admissions were not a product of "free will" as required under *Wong Sun* and *Brown* v. *Illinois*, *supra*, at 603. We necessarily place much reliance in these matters on the "learning, good sense, fairness and courage of federal trial judges." *Nardone* v. *United States*, 308 U.S. 338, 342 (1939).

Affirmed.

THOMSEN, *Senior District Judge*, concurring and dissenting:

I agree that there was no sufficient justification to arrest Chadwick or Ms. Leary, that the statements Chadwick made after his arrest were properly suppressed, and that there was no justification for opening Ms. Leary's suitcase or Machado's suitcase as and when they were opened; but I respectfully dissent from that portion of the opinion which holds that opening the footlocker in the JFK building violated Machado's Fourth Amendment rights.

The information which the agents had received before the train arrived in South Station justified their suspicion that the footlocker contained contraband (a large quantity of marijuana). After Duke, the detector dog, trained to sniff out controlled substances, gave an "alert response", the agents had probable cause to believe that the footlocker contained contraband; they also had probable cause to believe that Machado, who had traveled on the same train with the footlocker and had claimed it when it was unloaded from the train and was then sitting on it, was committing a felony in their presence. They might have arrested Machado then, *United States* v. *Watson*, —— U.S. —— 44 LW 4112 (January 26, 1976), and did not lose that right by waiting until Machado caused the footlocker to be placed in the trunk of the automobile. I believe that the agents could also have seized and searched the footlocker in the station, after the dog gave the affirmative signal, on the ground

that there was probable cause to believe that it contained contraband and was being used in committing the offense. This conclusion is supported by *United States* v. *Buckhanon*, 505 F.2d 1079 (8 Cir. 1974); *United States* v. *Johnson*, 467 F.2d 630 (2 Cir. 1972), *cert. denied*, 410 U.S. 932, 413 U.S. 920 (1973); *United States* v. *Mehciz*, 437 F.2d 145 (9 Cir.), *cert. denied*, 402 U.S. 974 (1971).

A railroad station, after the arrival of a train, is not a good place to conduct such an arrest and search, especially when the agents did not know whether one or more men might respond to the telephone call Machado had made. Nor is a street outside the station a good place to open a footlocker containing marijuana. The agents acted wisely in arresting Machado at the car, and in postponing until they arrived at JFK opening the footlocker, to confirm the fact that it contained contraband. If it had proved not to contain contraband, the agents should and presumably would have released Machado immediately. He was not hurt by the delay in opening the footlocker.

The thorough review of Fourth Amendment cases in the majority opinion herein illustrates the thicket through which state and federal judges, as well as state and federal law enforcement officers, must struggle in cases such as this. I believe that the cases cited above justify the conclusion that the principles which control the right of an officer to arrest without a warrant a person who is committing a felony in his presence in a public place should also permit

the officer to open a suitcase, a footlocker or other container which he has probable cause to believe is being used to commit the offense in his presence and to seize the contraband therein.[1]

[1] No invasion of a house or other real property was involved in this case.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 75-1165

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH A. CHADWICK ET AL.,
DEFENDANTS, APPELLEES

JUDGMENT

Entered March 29, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup, *Clerk.*

APPENDIX C

UNITED STATES DISTRICT COURT,

D. Massachusetts

Crim. No. 73-239-T

THE UNITED STATES

v.

JOSEPH A. CHADWICK ET AL.

Jan. 13, 1975

SUPPLEMENTAL OPINION—April 10, 1975

OPINION AND ORDER

TAURO, District Judge.

Defendant Joseph Chadwick and his two co-defendants, Bridget Leary and Gregory Machado, are charged in a two count indictment with possessing marijuana with intent to distribute, and with conspiring to possess with intent to distribute.

Before the court is Chadwick's motion to suppress the fruits of warrantless searches of a footlocker, two suitcases, and of his person. The searches were conducted by government agents some time after his arrest outside the South Station railroad terminal on May 10, 1973. He has also moved to suppress statements made by him after his arrest.

In support of his motion, Chadwick asserts 1) that his warrantless arrest was without probable cause; 2) that there was no justification for a search of his person; 3) that although he was in a custodial situation when he made statements to federal agents, he was not warned of his rights; and 4) that the warrantless search of the footlocker and luggage cannot be justified by any exception to the requirements of the Fourth Amendment.

Following the hearing on Chadwick's motion to suppress, defendant Leary filed a motion to suppress all evidence obtained by the warrantless searches of the footlocker and suitcases that were seized by the federal agents. She also moved to suppress any statements made by her following her arrest on the grounds that the arrest was made without probable cause. Both Leary and Chadwick rely on the same grounds for suppressing the evidence obtained as a result of the warrantless search of the footlocker.[1] The Government has chosen to rely on the same argu-

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[1] Marijuana was found in both of the suitcases as well as in the footlocker. For convenience in reference and because the items searched are legally indistinguishable, both the Government and the defendants have focused on the footlocker. While some factual details are different (the suitcases were not leaking talcum powder; the dog alerted to the footlocker, not the suitcases; the suitcases were smaller than the footlocker; there was no evidence of a second lock on the suitcases; the information from San Diego related to the footlocker, not the suitcases), none of these factors, either singly or in combination would warrant a different result on the motion to suppress. Accordingly, the decision of this court applies to both the suitcases and the footlocker.

ment in opposition to both motions. Accordingly, the motions to suppress are consolidated in this opinion.

The circumstances surrounding the defendants' arrest and the subsequent search are as follows.

On May 8, 1973, federal agents in Boston received reliable information from their San Diego counterparts that a footlocker suspected of containing marijuana was being shipped by train to Boston. This information indicated that the trunk in question was leaking talcum powder, a substance used to mask the odor of marijuana, and that the shipper, the defendant Machado, fit a profile used by Amtrak officials to spot drug traffickers. The destination address of the footlocker was Machado's Massachusetts residence. Machado obtained passage for two to Boston on the same train in the name of Mr. and Mrs. Machado. His traveling companion was subsequently identified as the defendant Leary. This information, together with a description of Machado, was furnished by Amtrak officials to the San Diego agents and was relayed to agents in Boston.

The Boston agents determined that Machado's train was due at approximately 7:50 p.m. on May 10, 1973. While some preliminary investigation was done on May 8, 9 and 10, the agents made no attempt to secure search or arrest warrants. When the train stopped at New Haven on May 10, Amtrak officials verified that the footlocker was still aboard. This information was conveyed to the Boston agents who placed South Station under surveillance.

The train arrived in Boston approximately one hour late. The agents identified Machado from the description that had been provided them. They observed Machado and Leary take possession of an old brown footlocker and two suitcases. A trained detector dog was brought into the station rotunda near where Machado and Leary were waiting. The dog "alerted" to the presence of marijuana in the footlocker which Machado and Leary had claimed.

After claiming the footlocker, Machado was observed making a telephone call. The agents were unable to see the number that was dialed, nor did they overhear any portion of the conversation.

Shortly thereafter, Chadwick entered South Station and went up to Machado and Leary. The three engaged in brief conversation after which they all left the station with a railroad porter who was pushing the footlocker on a baggage cart. Leary entered the passenger side of a Dodge Polara automobile parked outside South Station. Machado and Chadwick assisted the porter in placing the footlocker onto the floor of the automobile's trunk. The automobile engine was not running and the trunk lid was wide open. At this point, approximately 9:15 p.m., federal agents, who were among a number of law enforcement officials staking out the area, placed all three defendants under arrest and took possession of the automobile and the footlocker as well as the personal luggage of defendants Machado and Leary. Subsequent to their arrest, keys and documentation indicating his ownership of the footlocker were found

on the defendant Machado. No such evidence was found on the defendant Chadwick.

The defendants were driven to the John F. Kennedy Federal Building (J.F.K.) in government vehicles. A government agent drove the Dodge Polara with the footlocker still in its trunk to J.F.K. Sometime between 9:30 and 11:00 p.m., federal agents opened the footlocker in their J.F.K. offices, and found a large quantity of marijuana. Marijuana was also found in the two suitcases. At no time did the federal agents secure a search warrant.

Arguably incriminating statements were made by the defendant Chadwick subsequent to his arrest, either in the vehicle on the way to J.F.K. or at the agents' J.F.K. offices.[2] A search of Chadwick's person following his arrival at J.F.K. revealed a small amount of marijuana.

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[2] The statements made by Chadwick were part of a conversation that he had with two federal agents. While the anegts who accompanied Chadwick to the J.F.K. building testified differently as to where the conversation occurred, they both agreed as to the substance of the conversation. Chadwick said that he had come down from Salem, New Hampshire, to pick up a friend. Then he asked the agent how he knew what was in the trunk. The agent responded that he would ask the questions and asked Chadwick how he knew. Chadwick said that he did not know what was in the trunk. Precisely where the conversation occurred is immaterial for the purposes of this motion to suppress since both agents agreed that it occurred after Chadwick was arrested.

I. PROBABLE CAUSE TO ARREST CHADWICK

Chadwick claims that his arrest was without probable cause, and this court agrees.

Probable cause to effectuate a warrantless arrest only exists "if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134 (1959). *Accord*, Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L. Ed. 1879 (1949); Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The circumstances surrounding Chadwick's arrest fall short of meeting this standard.

There is no evidence as to whom Machado called from the South Station. But even if it may be presumed that Machado called to inform Chadwick of his and Leary's arrival, a non-criminal explanation of Chadwick's conduct is at least as likely as one indicating that "an offense has been or is being committed." Brinegar v. United States, 338 U.S. at 176, 69 S.Ct. at 1311.

Simply stated, the non-criminal explanation is that two friends of Chadwick arrived by train from an out-of-town trip. The train was late. They called and asked him to pick them up at the station. He arrived at the station, exchanged pleasantries and assisted the porter in placing their luggage in the open trunk of a car. Then, he was arrested.

There was no evidence that agents had been alerted, during the several days they were awaiting Ma-

chado's and Leary's arrival, to the likelihood or even the possibility of a third party accomplice being involved. There was no evidence that Chadwick was recognized as a trafficker by the agents who observed him entering South Station. There was no evidence that the defendant Chadwick knew what was in the trunks, nor can such knowledge be inferred from the record. The most the government can squeeze from these operative facts is that, when arrested, Chadwick was in the presence of two people suspected of criminal activity. His presence at the railroad station and his momentary contact with the footlocker, as he assisted the porter and Machado in placing it in the trunk of the car, are fully explicable in terms of noncriminal conduct and add nothing to the government's case. "Mere presence at the scene of a criminal offense does not support an inference of guilt of that offense." Newsom v. United States, 335 F.2d 237, 239 (5th Cir. 1964). *See, e.g.*, McDonnell v. United States, 472 F.2d 1153, 1156 (8th Cir.), cert. denied 412 U.S. 942, 93 S.Ct. 2785, 37 L.Ed.2d 402 (1973).

The Government concedes, at page three of its memorandum, that to a lay observer the circumstances of Chadwick's involvement might appear innocent, but argues that an experienced agent would recognize them as being significant. According to the Government, an experienced observer could readily detect that Chadwick was being used as a "mule" —a courier for transporting drugs. This argument would appear to urge adoption of a subjective stand-

ard of probable cause which would require, as a threshold matter, an evaluation by the court of an agent's experience and ability in order to weigh what criminal significance he might have legitimately ascribed to a given set of circumstances. To adopt such a standard would set an unfortunate precedent with the distinct possibility of facially inconsistent results, depending on the impression a particular agent made on a particular judge.

Certainly, as was noted in United States v. Kancso, 252 F.2d 220, 222-223 (2d Cir. 1958), government agents, in their efforts to protect the public, must depend on a variety of resources, including their own knowledge and expertise. This is why undercover efforts are permitted, and the law with respect to entrapment is geared to protect unwary innocents as opposed to unwary criminals. It is quite another matter to say, in effect, that probable cause is in the eyes of the beholder; that the results of a probable cause hearing could vary depending on whether the key witness happened to be a government agent as opposed to a private citizen. It would be impossible to rationalize such an approach with a concept so fundamental to fair trial; *i. e.*, that, subject to exceptions not here material, the weight and credibility of all testimony is to be judged by the same standards.

We do not handcuff our government agents by requiring that they arrest only when the facts upon which they wish to rely would warrant *a man of reasonable caution*—as opposed to one of extraordi-

nary sophistication—in concluding criminal activity was taking place. They are merely required to meet a standard that can be understood by the average reasonably prudent person.

The Supreme Court has consistently rejected any attempt to dilute the probable cause safeguard. Neither mere suspicion nor subjective good faith can substitute for objective, probable cause as a basis for arrest.

> Anything less [than probable cause] would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968) *citing* Beck v. *Ohio*, 379 U.S. 89, 96-97, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L. Ed.2d 1688 (1960); Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959).

The Government's effort to justify the arrest on the grounds that Chadwick was at least in constructive possession of the footlocker and, therefore, is presumed to know of its contents must also fail. There is no evidence sufficient to warrant a finding that, at the time of arrest, Chadwick had exercised any dominion or control over the subject footlocker. His contact with the footlocker in the South Station was less than that of the porter. His assisting the porter and Machado in placing the footlocker in the trunk was not an exercise of dominion and control.

Indeed, the fact that the footlocker had been placed on the floor of the car's trunk did not transform Chadwick's role or status into a possessory one. As a matter of fact, the agents had no information prior to Chadwick's arrest that he owned or had rented the Dodge Polara, or that he was the one who drove it to South Station. On the facts available, Chadwick was no different from thousands of others who pick up passengers at various terminals and yet cannot be deemed to have dominion or control of their baggage. The evidence being insufficient to warrant a finding of possession, there can be no permissible inference of knowledge with respect to the contents of the footlocker.

Even assuming, however, that somehow at least a joint constructive possession on the part of Chadwick could be presumed, the facts do not warrant a presumption of knowledge as to the footlocker contents.

In Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), which dealt with a statutory presumption of knowledge, the Court established that such a presumption is unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.* 395 U.S. at 36, 89 S.Ct. at 1548. This standard is also applicable to common law inferences such as an inference of guilty knowledge from the fact of unexplained possession of stolen goods. *See* Barnes v. United States, 412 U.S. 837, 845 n. 8, 93

S.Ct. 2357, 37 L.Ed.2d 380 (1973). Thus, there can be no automatic inference from Chadwick's momentary joint possession of the footlocker trunk that he knew the trunk contained marijuana.

None of the cases cited by the Government adequately support its position that knowledge of the contents can automatically be inferred from momentary possession. Primary reliance is placed on People v. Nettles, 23 Ill.2d 306, 178 N.E.2d 361 (1961), cert. denied, 369 U.S. 853, 82 S.Ct. 939, 8 L.Ed.2d 12 (1962). That case dealt with possession of narcotics that were found in the apartment in which the defendant was living, a factual situation clearly distinguishable from the operative circumstances of this case.

State v. Funk, 490 S.W.2d 354 (Mo. Ct.App. 1973), also cited by the Government, stands for the proposition that one in exclusive control of a dwelling may be deemed to knowingly possess what is contained therein. That court drew a major distinction, however, between exclusive and joint control and concluded that where control was joint, some further evidence must be adduced connecting the defendant with the drug. *Id.* 490 S.W.2d at 361. *Accord*, United States v. Bonham, 477 F.2d 1137 (3rd Cir. 1973). In this case, there was no such evidence tying Chadwick to the footlocker or its contents.

The Government also cited People v. Reisman, 29 N.Y.2d 278, 327 N.Y.S.2d 342, 277 N.E.2d 396 (1971), in support of its position. There the evidence showed that the defendant claimed two packages of

marijuana addressed to him at Kennedy Airport. While it may well be valid to infer that a person knows the contents of a package addressed to him, such a proposition has no application to the facts of this case. The destination address of the footlocker was Machado's, not Chadwick's. The trunk was claimed by Machado, not Chadwick. Even the dicta of *Reisman* indicating that one may be presumed to know the contents of his automobile is of no assistance to the Government, there being no evidence prior to his arrest that Chadwick owned, drove or leased the Dodge Polara.[3]

Judged against the standards established by the Supreme Court in Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970); and Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), this court must conclude that the Government has not sustained its burden of demonstrating that the presumed fact—knowledge—follows more likely than not from the proved fact—momentary, joint possession. Chadwick's conduct is wholly explicable as non-criminal conduct and the Government has adduced no additional evidence linking him with the footlocker containing marijuana.

There having been insufficient cause to justify Chadwick's arrest, his subsequent statements and all

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[3] The ancillary issue as to whether or not, under the circumstances, the footlocker was part of the "contents" of the automobile at the time of arrest is discussed in part III *infra*.

evidence seized during the post-arrest search of his person is suppressed.[4] Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

II. PROBABLE CAUSE TO ARREST LEARY

Defendant Leary has claimed that the agents also lacked probable cause to arrest her. This court disagrees and holds that the facts and circumstances surrounding her arrest were sufficient in themselves to warrant a man of reasonable caution in the belief that she was committing an offense. Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

At the time of her arrest, the agents reasonably believed that she was the wife of the defendant Machado. The tickets for the cross-country train trip were in the name of Mr. and Mrs. Machado. They were seen together in San Diego prior to the departure of the train. They arrived together at South Station; claimed the luggage together and were standing together when Chadwick entered South Station. When they left the station, she immediately entered the automobile while her "husband" and Chadwick assisted the porter in placing their luggage in the trunk.

Having redeemed their luggage together, Machado and Leary had joint possession and control of the footlocker trunk. The agents had probable cause to believe that it contained marijuana. The agents had probable cause to believe that the "wife" knew the contents of the baggage that accompanied her and her husband across the country. Indeed it strains credulity to suggest that a spouse would not know the contents of such a significant piece of luggage. That Leary was not the wife of Machado and that, in fact, she may not have known the contents of the footlocker is immaterial to a finding that the agents had reasonable cause to believe the contrary. Accordingly, this court finds that there was probable cause to arrest the defendant Leary.

III. THE WARRANTLESS SEARCH OF THE FOOTLOCKER

While the defendants, Chadwick and Leary, have disclaimed ownership of any of the luggage seized, they have standing to challenge the search. Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), gives a defendant standing to object to a search when charged with a crime wherein possession of the article is itself an essential element.

It is conceded that the footlocker was searched without a warrant. Warrantless searches are per se

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[4] Chadwick's alternate basis for suppressing his post-arrest statements—lack of *Miranda* warnings—was not supportable on the basis of the evidence presented at the hearing. The credible testimony disclosed that the *Miranda* warnings were read to both Chadwick and Machado by a railroad police officer who accompanied them to J.F.K. The federal agent who drove the vehicle then went over each of the rights and asked the defendants whether they understood each facet of their *Miranda* rights. Both defendants indicated that they understood their rights. This occurred prior to the conversation recited in note 1 *supra*. Hearing Transcript 31-35.

unreasonable, subject to a few carefully delineated and limited exceptions. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The search, therefore, can be justified only if it meets the requirements of some exception to the warrant requirement.[5]

The Government seeks to justify this search as an automobile exception, *see* Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), contending that the facts of this case are controlled by United States v. Soriano, 497 F.2d 147 (5th Cir. 1974) (en banc).

In *Soriano*, the evidence showed that federal law enforcement officials followed a taxi occupied by three people whom the agents had probable cause to believe were transporting heroin. Upon arrival at the Miami International Airport, the agents arrested the occupants of the cab, and removed three suitcases from that vehicle. The agents peeked into one of the suitcases at the place of arrest; the other two were searched at a place other than that of arrest. The district court suppressed the heroin found in all three suitcases. The court of appeals affirmed. Reversing both the district court and the court of appeals panel, the Fifth Circuit Court of Appeals, sitting en banc,

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[5] The recognized exceptions to the warrant requirement are (1) hot pursuit; (2) plain view doctrine; (3) emergency situation; (4) automobile search; (5) consent; and (6) incident to arrest. United States v. Mapp. 476 F.2d 67, 76 (2d Cir.1973).

sustained the search on the rationale of Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

Chambers involved a warrantless automobile search at the police station following a late night arrest of the four defendants who were in their automobile parked in a dark parking lot. In upholding the delayed search, the Court held that a lawful search could have taken place on the spot because the automobile was readily movable and the opportunity to search was fleeting. The Court then reasoned that a warrantless seizure is arguably as intrusive of protected Fourth Amendment rights as a warrantless search. Noting that, for constitutional purposes, there was little to choose between a warrantless search and a warrantless seizure pending receipt of a search warrant from a magistrate, the court concluded, in the context of that case, that "[g]iven probable cause to search, either course is reasonable under the Fourth Amendment." 399 U.S. at 52, 90 S.Ct. at 1981. The delayed search was treated as if the initial exigency validating the warrantless seizure had continued.

Chambers was based on Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Supreme Court case that first articulated the automobile exception to the warrant requirement. The search in *Carroll* occurred on the open highway after police officers had stopped a speeding vehicle suspected of containing contraband liquor.

While the exact parameters of the automobile exception have not been determined, it is important to note at the outset out "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 461-462, 91 S.Ct. 2022, 2035, 29 L.Ed.2d 564 (1971) (Stewart, J.).

In all of the so-called automobile exception cases there was a nexus between the search and the automobile; a danger that if the warrantless search were not permitted, contraband might well disappear. In this case, there was no nexus between the search and the automobile, merely a coincidence. The challenged search in this case was one of a footlocker, not an automobile. The search took place not in an automobile, but in J.F.K. The only connection that the automobile had to this search was that, prior to its seizure, the footlocker was placed on the floor of the automobile's open trunk.

Unlike the situation in *Soriano*, the footlocker had not been transported in the automobile. It was being delivered from and not to a public transportation terminal. From the time that the defendants approached the automobile until they were arrested and in custody, the trunk lid of the automobile was never closed. The footlocker remained in plain view at all times. The motor of the car was not running. No one was in the driver's seat behind the wheel. Under these circumstances, the floor of the automobile trunk was nothing more than a platform or resting place for the footlocker.

Arguably, the Boston agents had probable cause to arrest Machado and Leary when they claimed the footlocker at South Station. Even if they did not have probable cause at that instant, they clearly had probable cause after the detector dog had alerted to the presence of marijuana in the footlocker trunk. Had the arrest taken place in the station area, a warrant would have been required before the footlocker could have been permissibly searched. Had the arrest taken place while the footlocker trunk was on the porter's trolley, a warrant would have been required. *See* United States v. Garay, 477 F.2d 1306, 1308 (5th Cir. 1973); United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974). To hold that merely placing the footlocker onto the floor of the trunk of an automobile, parked with its motor off and its driver's seat empty, invokes the automobile exception would be to trigger consideration of the automobile exception anytime an automobile was even remotely in the picture.

But even assuming the facts of this case warrant consideration of the automobile exception, the rationale under which we validate searches of automobiles without a warrant is of no help to the Government here. The concept of a vehicle containing contraband liquor fleeing on the highway in the night is very remote from the situation in this case. *See* Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The various extensions of *Carroll* have all been justified on the presence of some exigency, a realistic danger that evidence would

disappear unless a warrantless search were permitted. In *Chambers*, the Court extended the rule by allowing the officers to defer the search of the automobile until it was taken to the stationhouse. In *Soriano*, the court allowed the luggage that was seized from a taxicab in which the defendants arrived at an airport to be searched in part at the airport and later in full at the stationhouse.

However great or slight the exigencies might have been in those cases, none of them are present here. The automobile was not moving. There were no known or suspected accomplices in the area. In fact, the agents had deferred the arrest until the defendants were outside the station precisely to determine whether there were other individuals involved. The defendants were arrested, handcuffed and placed immediately into government vehicles. There were numerous officers present, including city policemen, railroad guards and federal agents. The arrest took place within 10 blocks of the federal courthouse past which the agents traveled on their way to J.F.K. where the actual search took place. The footlocker was locked with two different locks and, immediately after the arrest of the defendant, the keys that opened the locks were obtained by federal agents. The footlocker, which weighed two hundred pounds, was not in imminent or even potential danger of being destroyed or spirited away.

In brief, no exigency that would justify a warrantless search on the grounds of an automobile exception to the warrant requirement of the Fourth

Amendment can be found on the facts of this case. To rule otherwise would be to establish a per se rule permitting a warrantless search any time an automobile was even remotely involved in an arrest. While such a rule might be convenient for law enforcement officers, as well as for courts which are required to decipher and distinguish the many precedents in this troublesome area, it would be an unnecessary and undesirable dilution of existing Fourth Amendment safeguards.

The Government has placed exclusive reliance on the automobile exception as a basis for validating this warrantless search. That argument has been rejected. The court has examined the other exceptions to the warrant requirement and finds that none of them are applicable to the facts of this case. There being no justification for the warrantless search of the footlocker trunk and suitcases, all evidence obtained therefrom is hereby ordered suppressed.

SUPPLEMENTAL OPINION

On January 13, 1975, an opinion and order was entered granting the defendants' motion to suppress. On February 7, 1975, the Government filed motions to reconsider and to vacate.[1] The motion for reconsideration was granted and a hearing held on the motion to vacate.

In support of its motion to vacate, the Government introduced additional evidence with respect to the search of the suitcases and also offered an additional theory to support the footlocker search. Although none of this evidence was inconsistent with the court's previous findings of fact, it did provide more detail concerning the search of the two suitcases. The court makes the following supplemental findings of fact, but incorporates by reference the findings and conclusions made in its original opinion dated January 13, 1975.

SUPPLEMENTAL FINDINGS OF FACT

As the three defendants departed the South Station terminal, the defendant Leary was carrying one of the two Tourister suitcases (see January 13, 1975

[1] The Government filed a notice of appeal on February 10, 1975. By an order dated February 25, 1975, the Court of Appeals granted leave to the district court to entertain and act on the Government's Motion for Reconsideration. While retaining appellate jurisdiction of the case, the Court of Appeals stayed further prosecution of the appeal pending the action of this court on the Government's motion.

opinion at p. 767) which she placed in the passenger compartment of the automobile. The other suitcase was placed in the automobile trunk with the footlocker. Neither suitcase was opened or removed from the vehicle before the federal agents drove the automobile to J.F.K.

At their J.F.K. offices, the agents opened the footlocker first, using the keys that had been found on the defendant Machado. It was at this time that the marijuana was first seen in the footlocker. (See January 13, 1975 opinion at pp. 767-768).

After having opened the footlocker, the agents then sought to open the two suitcases, ostensibly for the purpose of inventorying their contents. Both suit cases were locked. The agents opened both suitcases by picking their locks. Marijuana was found in both suitcases. Permission to open the suitcases was not sought or obtained from any of the defendants and the agents made no effort to secure a search warrant. Although the Government claims that the purpose for searching these suitcases was to inventory the items contained therein, no inventory list was introduced into evidence. Moreover, there was no evidence that an inventory list was prepared and given to the defendants. The Government represented that the inventory search was conducted pursuant to a procedure specified in the Agents Manual.[2]

[2] Agents Manual, ¶ 6662.25 (A) (2). Collection and Handling of Other Personal Property:

Personal property of non-evidentiary value which is

I

THE FOOTLOCKER SEARCH

The Government's original opposition to defendant's motion to suppress the fruits of the footlocker search was based exclusively on the "automobile exception" to the search warrant requirement. (See January 13, 1975 opinion at pp. 767-768). The Government now asserts that this search should be justified as one incident to arrest. Its theory is that had the search taken place when the defendants were arrested, it would have been valid,[3] and the mere fact it was delayed does not make it any less valid as an exception to the warrant requirement of the Fourth Amendment. The court disagrees.

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found in a seized automobile will be handled as outlined in 6654.23.

Agents Manual, ¶ 6654.23 Seizure Proceedures:

Upon seizing the vehicle, it must be thoroughly searched. A search performed pursuant to civil seizure need not be contemporaneous with an arrest, and no search warrant is necessary. Remove all articles from the vehicle which are not part of the vehicle itself.

Personal propery in the vehicle should be returned to the owner or the person from whom the vehicle was seized, and a receipt obtained.

[3] Since a lawful arrest is a necessary condition precedent to a search incident to arrest, this argument is not applicable to the defendant Chadwick since his arrest was illegal. *See, e.g.*, Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); January 13, 1975 opinion at pp. 767-771.

In the recent cases of United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) and Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 LEd.2d 456 (1973), which dealt with warrantless searches of the person, the Court noted essential differences between a search of a person as contrasted with a search of the area within his control. A key issue to be determined in the latter situation is the scope and meaning of the phrase "area within his control."

An analytical framework for applying that phrase to differing factual settings was given by the Court in Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969):

> There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

The vitality of the *Chimel* test has not been affected by *Robinson*, *Gustafson*, or other subsequent Supreme Court opinions.

In arguing that a search of a 200 pound, double-locked footlocker is encompassed in the phrase "area within his immediate control," the Government has cited five cases, Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); United States v. Buckhanon, 505 F.2d 1079 (8th Cir. 1974); United States v. Maynard, 439 F.2d 1086 (9th Cir. 1971); United States v. Mehciz, 437 F.2d 145 (9th

Cir.), cert. denied, 402 U.S. 974, 91 S.Ct. 1663, 29 L.Ed.2d 139 (1971); United States v. Lugo-Baez, 412 F.2d 435 (8th Cir. 1969), cert. denied, 397 U.S. 966, 90 S.Ct. 1000, 25 L.Ed.2d 257 (1970). In all of these cases, the luggage that was searched was being carried by the defendant at the time of his arrest. It may be that hand-carried luggage is encompassed in the phrase "area within his immediate control." But the footlocker in this case was not hand-carried luggage. It was a double-locked, 200 pound container that had already been placed in the open trunk of an automobile at the time of the arrest. At the time of the arrest, the defendants had been immediately handcuffed and surrounded by numerous federal and local law enforcement officials. To hold under these circumstances that this footlocker was an area "from within which [the defendant] might gain possession of a weapon or destructible evidence" would be to render meaningless the limitations imposed by the Court in *Chimel*. As a matter of fact, practicality and law, this footlocker was simply not within the control of the defendants at the time of arrest.[4]

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[4] Since this court has ruled that the search of the footlocker could not be justified as a search incident to arrest had it taken place contemporaneously with the arrest, there is no need to determine whether the delayed search could be justified as "substantially contemporaneous." *Compare* Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964) "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to arrest," *with* United States v. Edwards, 415 U.S. 800, 803, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974), "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." See Coolidge v. New Hampshire, 403 U.S. 443, 457, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

II

THE SEARCH OF THE SUITCASES

In its memorandum in support of its motion for reconsideration, the Government asserted that "the opening of the suitcase was effected—not as a search for more incriminating evidence—but simply to inventory the contents of the suitcase according to established DEA procedure." Government Memorandum at 3. Because the Government placed exclusive reliance on the inventory search exception, it did not attempt to justify the search of the luggage on the search incident to arrest exception. In any event, the suitcase searches could not be upheld as incident to arrest because there was no showing that, at the time of arrest, the suitcases were within the immediate possession or control of any of the defendants.

At the time of arrest, both suitcases were locked. One was in the automobile trunk and was as inaccessible as the footlocker. The other was somewhere in the passenger compartment of the automobile. While the defendant Leary was seated on the passenger's side of the front seat, there was no evidence that the suitcase was even within her reach

let alone her control. "[T]he burden is on those seeking the exemption [from the warrant requirement] to show the need for it." United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951). That burden has not been sustained.[5]

The Government's attempts to justify the suitcase searches as "inventory searches" must also fail. This search was not required or authorized by the section of the Agents Manual pursuant to which the Government claims the agents were acting. The relevant portion provides only that "upon seizing the vehicle, it must be thoroughly searched . . . . Personal property in the vehicle should be returned to the owner or the person from whom the vehicle was seized, and a receipt obtained." Agents Manual ¶ 6654.23 (March 19, 1974). This section does not require or even suggest that the agents are authorized to forcibly open a closed, locked suitcase for the purpose of "inventorying" its contents.

Even assuming the Agents Manual could be construed to have authorized the suitcase searches, such authorization would not validate an otherwise unconstitutional search. An inventory search is, nonetheless, a search within the meaning of the Fourth

[5] Even if the suitcase search at a different time and place could be justified as "incident to arrest," it would be difficult to justify that extension to the facts in this case. Both suitcases were locked and no one had the keys to open them. The agents were forced to pick the locks in order to open the suitcases. Such facts demonstrate rather forcefully that the suitcases were not an area from which an arrestee could readily obtain either a weapon or destructible evidence.

Amendment. *See, e.g.*, Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); United States v. Lawson, 487 F.2d 468 (8th Cir. 1973); Mozzeti v. Superior Court, 4 Cal.3d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971); *cf.* Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The reasonableness of an inventory search is to be tested against established constitutional principles, and not on the basis of routine administrative practice.

Inventory searches have been justified for a number of reasons including safeguarding the personal property of the arrestee, insulating the agents from later claims of theft or lost property, as well as institutional safety. None of these considerations is available to justify as inventory searches the breaking into these suitcases. It is simply not credible to suggest that a closed, locked suitcase posed a threat to the institutional safety. The suitcases were securely in the possession of the agents and the defendants were all in custody.[6] No more credible is the theory advanced by the Government that the search was necessary to protect the agents from later claims of theft or lost property. It is difficult to see how the integrity of agents is safeguarded by picking the lock to a suitcase. Such forcible entry would likely invite more, rather than fewer, claims

[6] Agent Christopher testified that the inventory was not conducted because of concern for institutional safety and that the agents did not suspect that the suitcases contained explosives. See Transcript, March 6, 1975 hearing at p. 14.

of theft. Breaking open the suitcases (the description used by the agent who testified) was an unreasonable and, therefore, unacceptable approach to the problem.

Other reasonable alternatives, less drastic but at least as effective, were available to the agents. The locked suitcases could have been placed in a locked storage facility, the key to which locker could then have been sealed in an envelope and kept with the other personal property taken from the defendants. Alternatively, the agents could have placed sealing tape over the lock of the suitcase which could have been initialed by the defendants and/or an agent.[7] Either of these procedures would have been reasonable. The Government's approach was not. Since "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible," Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968) (citations omitted), the present search, which went far beyond the permissible limits of an inventory search, cannot be upheld on that rationale.

Both of the cases cited by the Government in support of its inventory search rationale are readily distinguishable. In Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), an

[7] For a discussion of other reasonable alternatives to an inventory search, *see* Mozzetti v. Superior Court, 4 Cal.3d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971); Note, The Inventory Search of an Offender Arrested for a Minor Traffic Violation, 53 B.U.L.Rev. 858, 869 (1973).

incriminating piece of evidence came into plain view when a police officer opened the door of defendant's impounded car for the purpose of closing the window since it had just started to rain. Since that minimal intrusion to safeguard the car was a legitimate police function, *Harris* is merely an application of the plain view doctrine. Justice Douglas, concurring, noted that this case did not undermine the Court's previous holding in Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), where the Court held illegal a full-blown inventory search. In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), the Court upheld an inventory search of an automobile that was being held subject to forfeiture proceedings. The search occurred one week after the defendant had been arrested and the car impounded. Since "the reason for and nature of the custody may constitutionally justify the search," 386 U.S. at 61, 87 S.Ct. at 791, the Court held that an inventory search pursuant to a forfeiture proceeding was constitutionally permissible.

In this case, there was no claim that the suitcases were being held for forfeiture proceedings. The agents viewed the suitcases as the personal property of the defendants and intended only to "safeguard" their contents pending release of the defendants. Neither *Harris* nor *Cooper* justifies the agent's picking the locks of these suitcases.

III

SUPPRESSION OF CHADWICK'S STATEMENT

The Government challenges this court's order suppressing the statements made by the defendant Chadwick shortly after his illegal arrest. (See January 13, 1975 opinion at pp. 770-771). The Government's position is that the agent's recitation of *Miranda* warnings to Chadwick purged his statement of any taint occasioned by the illegal arrest. This court disagrees.

The Government has focused on only one of two factors deemed important by the Court in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). The threshold question is whether Chadwick's statement was voluntary. The mere recitation of *Miranda* warnings is not a guarantee that the statement made was voluntary. *Miranda* teaches that in-custody interrogation is inherently coercive, even as to one who is lawfully in custody. That coercive element is exacerbated where the initial arrest is illegal.

> It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not.[8]

[8] Devlin, The Criminal Prosecution in England (1958), *as quoted in* Wong Sun v. United States, 371 U.S. 471, 486 n. 12, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963).

The second element that led to the suppression of the defendant Toy's statement in *Wong Sun* was the perceived need to impose sanctions on the illegal conduct of the police. The Court held that this could best be achieved by depriving the police of the fruits of their illegal conduct. Only where the statement was made as a result of an "intervening independent act of free will" did the Court uphold the admission of the statement made following an illegal arrest.

Both factors are relevant to this case. Although the defendant had received his *Miranda* warnings in the agents' car shortly before the allegedly incriminating statement was made, he was not requested to execute nor did he execute a waiver of his *Miranda* rights. The Government has the heavy burden of establishing that Chadwick both *voluntarily* and *knowingly* abandoned his right to remain silent. This is particularly so since he was interrogated within a few short minutes after being illegally arrested. The Government has failed to meet this burden.

The court reaffirms its opinion and order of January 13, 1975. The motion to vacate that order is hereby denied.

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APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-1721

UNITED STATES OF AMERICA,

Petitioner

—v.—

JOSEPH A. CHADWICK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MAY 26, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1721

UNITED STATES OF AMERICA,

Petitioner

—v.—

JOSEPH A. CHADWICK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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[1] The opinion and judgment of the court of appeals, and the opinion and supplemental opinion of the district court, are reproduced in the appendix to the petition for a writ of certiorari.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Crim. No. 73-239-T

THE UNITED STATES OF AMERICA

v.

JOSEPH A. CHADWICK, ET AL.

RELEVANT DOCKET ENTRIES

1973

Nov. 2 Indictment returned.

Nov. 14 ARRAIGNMENT on superseding indictment; Defendant Chadwick appeared with Anthony M. Arena, Counsel; Leary appeared with Raymond F. McColough; Machado (Philip Myman, Counsel did not appear; atty. McColough represented defendant for arraignment) Pleas of NOT GUILTY entered; bail set in the amount of $1,000wos on all Defendants; Government already provided discovery under Rule 16(a) additional motions to be filed on or before December 5, 1973.

Dec. 5 Deft Chadwick's Motion for a hearing, filed c/s.

Deft Chadwick's Motion for Oral Statements of Defendant's filed c/s.

Deft Chadwick's Motion to Suppress, filed c/s.

Deft Chadwick's Motion for Bill of Particulars, filed c/s.

Deft Chadwick's Motion for Statement of Co-Conspirators, filed c/s.

Deft Chadwick's Motion to Dismiss, filed c/s.

1974

Feb. 7 DAVIS, USM. Memorandum on Motion To suppress: ". . . If either party objects to the recommendation of the Magistrate, he should file those objections within 10 days from the date hereof, provided the objections are accompanied by a memorandum.

Apr. 3 Notice of hearing on Dft. Chadwick's motions to dismiss and to suppress for April 11, 1974 at 10 A.M. to Messrs. Cohen and Keating.

May 2 Notice of hearing on motion to suppress and motion to dismiss for May 30, 1974 at 10 A.M.; copy to Messrs. Cohen and Keating.

1975

Jan. 20 Dft. Machado's motion to join in co-defendant's motion to suppress, memorandum in support thereof and opinion and order of this Honorable Court, filed c/s.

Jan. 21 TAURO, D.J. Motion to join in co-defendant's motion to suppress, and opinion and order of this honorable court, "ALLOWED." Copies to Messrs. Nyman Steadman, Keating Arena and Weinberg.

Feb. 7 Govt's motion to vacate order and for reconsideration, filed c/s.

Feb. 10 Government's Notice of Appeal, filed, c/s.

Feb. 25 Order of Court received from the Court of Appeals entered . . . Upon the Government's Motion for Reconsideration, with the district court to report promptly to this court the decision thereon; and it is ordered further prosecution of this appeal be stayed pending the district court action on said motion.

Mar. 6 TAURO, D.J. Hearing on Govt's motion to Vacate Order; Evidence; Arguments; Both sides have one Week to file Further Memos. After this Advisement.

Apr. 10 TAURO, D.J. Supplemental Opinion filed: ". . . The Court reaffirms its opinion and order of January 13, 1975. The motion to vacate that order is hereby denied." Copy to all counsel; Opinion Book, West Publishing Co., Mass. Lawyers Weekly and NCAIR.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1165

UNITED STATES OF AMERICA

v.

JOSEPH A. CHADWICK, ET AL.

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS

1975

May 7 Record on appeal received and filed and case docketed.

May 12 Appearance of Martin G. Weinberg for appellee filed.

May 16 Appearance of Lawrence P. Cohen for appellant filed.

May 19 Statement of issues and designation of contents filed.

June 10 Motion filed. Order (Coffin, Ch. J.) enlarging time for filing brief for appellant and appendix to and including June 26, 1975. Notices mailed.

June 26 Appendix to briefs and brief for appellant filed.

July 8 Motion filed. Order (Coffin, Ch. J.) enlarging time for filing brief for appellee to and including August 8, 1975. Notices mailed.

July 17 Brief for appellee Bridget Ann Leary filed.

July 30 Request for appointment filed. Order (Coffin, Ch. J.) appointing Philip S. Nyman, Esquire, counsel for appellee Gregg John Machado. Order (Coffin, Ch. J.) granting leave to Gregg J. Machado to adopt brief filed on behalf of the other appellees. Notices mailed.

DATE	FILINGS—PROCEEDINGS

Aug. 8 Motion filed. Order (Coffin, Ch. J.) granting leave to appellee to file brief not in excess of 56 pages. Notices mailed. Brief for appellee Chadwick filed.

Aug. 28 Assigned for hearing at the September, 1975, session.

Sept. 9 Appearance of Jeanne Baker filed for appellees. Heard by Coffin, Campbell & Thomsen, JJ.

1976

Mar. 29 Judgment: The order of the District Court is affirmed. Opinion of the Court by Campbell, Circuit Judge. Concurring and dissenting opinion by Thomsen, Senior District Judge. Notices mailed.

Apr. 7 Motion filed. Order (Coffin & Campbel, J.J.) denying rehearing en banc and staying mandate pending certiorari. Notices mailed.

June 2 Notice from Supreme Court of filing petition for certiorari (5/26/76) [No. 75-1721] filed.

Oct. 8 Notice from Supreme Court granting petition for certiorari 10/4/76.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 73-239-T

UNITED STATES OF AMERICA

v.

GREGG JOHN MACHADO
BRIDGET ANN LEARY
JOSEPH A. CHADWICK

SUPERSEDING INDICTMENT

The grand jury charges:

COUNT I

That on or about the 10th day of May, 1973, at Boston, in the District of Massachusetts,

GREGG JOHN MACHADO,
BRIDGET ANN LEARY and
JOSEPH A. CHADWICK

knowingly and intentionally did unlawfully possess with intent to distribute 200 pounds, more or less, of marihuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code § 841(a)(1).

COUNT 2

That from on or about the 8th day of May, 1973, to on or about the 10th day of May, 1973, at Boston, in the District of Massachusetts, and elsewhere,

GREGG JOHN MACHADO,
BRIDGET ANN LEARY, and
JOSEPH A. CHADWICK

did knowingly and intentionally conspire, combine, confederate and agree together and with each other and

with divers other persons whose names are to the Grand Jury unknown, to commit an offense against the United States, that is, to possess with intent to distribute 200 pounds, more or less, of marihuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Crim. No. 73-239-T

UNITED STATES OF AMERICA

v.

JOSEPH CHADWICK

AMENDED MOTION TO SUPPRESS

Now comes the defendant in the above-entitled matter and moves that this Honorable Court pursuant to the Fourth and Fifth Amendments of the United States Constitution and pursuant to Rule 41 of the Federal Rules of Criminal Procedure suppress the following evidence which the defendant anticipates will be used by the government against him:

1. The approximately 200 pounds of green-brown vegetable matter which the government alleges to be marijuana;
2. The 0.83 net weight of green-brown vegetable matter allegedly marijuana and purportedly seized from defendant Chadwick after his arrest;
3. Any and all containers which the alleged marijuana was possessed in;
4. Any and all testimony by any law enforcement officers regarding observations or statements made of or by the defendant Chadwick after his arrest.

In support of this motion defendant states the following grounds:

1. That the defendant was arrested without probable cause;
2. That any searches incident to this arrest or any statements made as a result of this arrest were the product of an illegal seizure of the defendant's body and violation of his constitutional rights under the

Fourth, Fifth and Sixth Amendments of the United States Constitution;

3. That prior to 9:00 p.m. on May 10, 1973 the government possessed sufficient information to justify it in obtaining a search warrant based on probable cause the trunks on a train arriving on Boston possessed marijuana and in the absence of the obtaining of the search warrants the seizure of these trunks violated the Fourth Amendment of the United States Constitution;

4. That assuming the Government did not have sufficient evidence to warrant the obtaining of a search warrant prior to 9:00 p.m. on May 10, 1973, additional observations made after the arrival of the train in Boston on that date in and around that time warranted the obtaining of a search warrant based on probable cause and the warrantless post-arrest seizure and search of the trunks allegedly possessed or owned by the defendants was in violation of their Fourth Amendment rights under the United States Constitution;

5. The warrantless search of the trunks was not justified by any exception to the requirement of the search warrant; the defendants did not consent to this search, no contraband was in plain view at the time of the search, the search was not incident to an arrest, and there were no exigent circumstances of sufficient proportion to justify the warrantless search.

For all of the above reasons, the defendant moves that any and all use of evidence of any marijuana or any statements he made subsequent to his arrest be suppressed.

By his attorney

MARTIN G. WEINBERG

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 73-239-T

UNITED STATES OF AMERICA

vs.

BRIDGET A. LEARY

MOTION TO SUPPRESS

Now comes the defendant, Bridget A. Leary and under the provisions of the Fourth and Fifth Amendments of the United States Constitution and Rule 41 of the Federal Rules of Criminal Procedure moves that the following evidence in the possession the government and which the government intends to use against her be suppressed:

1. 85 packages wrapped in blue paper, sealed with masking tape, each package further wrapped in transparent cellophane, which material was contained in one 2'11" x 1'9½" x 1'8½" brown trunk, which packages allegedly contained marihuana in the amount of approximately 200 pounds.

2. 16 packages wrapped in blue paper, sealed with masking tape, each package further wrapped in transparent cellophane, all contained in one red "Tourister" suitcase, which packages allegedly contained marihuana.

3. 8 packages wrapped in blue paper, sealed with masking tape, each package further wrapped in transparent cellophane, all contained in one brown "Tourister" suitcase, which packages allegedly contained marihuana.

4. Any and all conversation, admissions, or testimony made by the said defendant to the government through its agents actively investigating in or participating in the arrest.

In support of this motion, the defendant states:

1. That no probable cause existed upon which a valid arrest could be made.

2. That there was sufficient time within which to obtain a proper search warrant and that the seizure without the search warrant violated the Fourth Amendment of the United States Constitution.

WHEREFORE the defendant moves that the evidence above referred to including any statements made by the said defendant be suppressed.

By her attorney,

/s/ Robert L. Steadman
ROBERT L. STEADMAN
89 State Street
Boston, Massachusetts
742-1535

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 73-239-T

UNITED STATES OF AMERICA

vs.

GREGG MACHADO, ET AL.

MOTION TO JOIN IN CO-DEFENDANT'S MOTION TO SUPPRESS, MEMORANDUM IN SUPPORT OF HIS MOTION TO SUPPRESS, AND OPINION AND ORDER OF THIS HONORABLE COURT

Now comes the defendant, GREGG MACHADO, and moves this Honorable Court grant him leave to join in Joseph Chadwick's (his co-defendant) Motion to Suppress, Memorandum in Support of his Motion to Suppress, and the Opinion and Order of this Honorable Court filed January 13, 1975. (See Criminal No. 73-239-T).

GREGG MACHADO
By his attorney,

/s/ Philip S. Nyman
PHILIP S. NYMAN

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 73-239 TAURO, D.J.

UNITED STATES OF AMERICA

vs.

JOSEPH A. CHADWICK, ET AL.

APPEARANCES:

Lawrence P. Cohen. Esquire, Assistant United States Attorney, for the Government.

Martin Weinberg, Esquire, Attorney for the Defendant.

[2] THE CLERK: Criminal 73-239-T, United States of America Vs. Joseph A. Chadwick, et al.

[Conference in Lobby.]

MR. WEINBERG: Ny name is Martin Weinberg. For the record, Mr. Chadwick is present in court. And I would request permission for Mr. Lawson, who is a law student in his third year, to sit with me during the course of this hearing. He did some work on it during the summer.

THE COURT: Okay. Nice to have you, Mr. Lawson.

MR. LAWSON: Thank you.

MR. WEINBERG: I also move to sequester the witnesses on the motion for suppression.

THE COURT: Okay.

MR. WEINBERG: On the motion to dismiss, I submitted a brief. I rest on the brief. It just deals with the overt acts alleged in Count 2 of the indictment.

THE COURT: I am familiar with the legal theory that you advance, and I am going to deny the motion to dismiss.

MR. WEINBERG: Your Honor, on the motion to suppress, I have filed a motion to amend my motion to suppress and then an amended motion to [3] suppress.

The amendment basically particularizes what I wish to suppress and the reasons in support of that.

THE COURT: May I have the papers, please? It seems to me that I allowed the motion to amend the motion to suppress. Okay.

MR. WEINBERG: Just to particularize the record, copies of that, as well as our memorandum, were submitted to all other counsel on this case.

Briefly, in the matter of an introduction, I am moving to suppress four different items, your Honor. The first is approximately 200 pounds of a substance which is identified as marijuana, which was found in a trunk seized from a rented vehicle which was connected with Mr. Chadwick.

Second, is a very minute amount of marijuana seized from Mr. Chadwick's body pursuant to his arrest.

Third, is the trunk itself and/or any other containers within which this alleged marijuana was contained.

Fourth, is any statements made by Mr. Chadwick subsequent to his arrest, since I understand it was done prior to his arrest.

[4] The reasons very briefly why I believe these items ought to be suppressed are the following:

Firstly, a lack of probable cause of the arrest of Mr. Chadwick as opposed to the other two defendants.

Secondly, the finding that probable cause that marijuana was contained in this trunk occurred at least two days prior to the arrival of the trunk in Boston.

The trunk was coming on an AMTRAK train from California. The government was in possession of certain knowledge and, therefore, a search warrant should have been obtained.

Thirdly, a search warrant should have been obtained anyway prior to the opening of the trunk, assuming the seizure of the trunk was legitimate.

Those are the principal grounds for the suppression, the motion for the suppression.

If I could call Mr. Christopher as my first witness.

Just prior to his testimony, I think Mr. Cohen and I can stipulate it was approximately 200 pounds identified as marijuana and a minute amount of marijuana.

Rather than introduce them individually, I think that we can stipulate that this [5] is the subject matter of this motion.

MR. COHEN: That's right, your Honor.

RICHARD G. CHRISTOPHER, Sworn

DIRECT EXAMINATION

BY MR. WEINBERG

Q State your name please?

A My name is Richard G. Christopher.

Q What is your present occupation?

A I am presently employed with the Drug Enforcement Administration, stationed at Boston, Massachusetts.

Q What was your occupation on May 10, 1973?

A On that date I was a special agent in the employment of the Bureau of Customs in Boston, Massachusetts, and assigned to the now defunct Office for Drug Abuse Law Enforcement, which is referred to as ODALE.

Q How long had you been a member of the Bureau of Customs at that time?

A Since 1966, July of 1966.

Q In connection with this case, when did you first hear the name of Greg Machado, a co-defendant in the matter styled 73-239-T?

A I heard the name first on or about May 8, 1973.

Q From whom did you hear that name?

A From special agent Paul Lavoie, who was at that time [6] a member of the Bureau of Narcotics and Dangerous Drugs.

THE COURT: Let me have that date.

THE WITNESS: May 8, 1973. And I received the information from special agent Paul Lavoie.

Q Approximately what time on the 8th did you receive this information?

A I can't say. I can only say it was after 9:00 o'clock in the morning, during normal working hours.

Q After 9:00 o'clock in the morning—before 5:00 p.m.?

A I'm pretty sure that would be the case.

Q What did Mr. Lavoie tell you to the best of your recollection?

A Mr. Lavoie stated to me that he had received a phone call from the ODALE office in San Diego, California, from special agent Scott Meadows, who apprised him on the telephone that a trunk, an old brown trunk had been shipped from the San Diego area via AMTRAK to Boston, Massachusetts, on or about May 8, and that the shipper's name was Gregory Machado.

It also listed his address, the address of the shipper, that is, as No. 4 Buttonwood Lane, North Scituate, Massachusetts.

Other conversation was the description of [7] Mr. Machado and so on and the arrival of the trunk.

Q Mr. Lavoie communicated all that information to you and told you the source of that information was an ODALE agent out in San Diego named Agent Meadows, is that correct?

A That is correct, sir.

Q Okay.

Did Agent Lavoie at the time tell you that Agent Meadows had told him that the trunk was leaking talcum powder?

A Yes, sir, he did.

Q And does that leakage have any significance to you as an experienced agent?

A Yes, sir, it does.

Q What is the significance, Agent?

A Well, the leakage doesn't—the presence of talcum powder. Talcum powder and other scented items are commonly used to cover up odors given off by controlled substances, such as marijuana or hashish.

Q Did Agent Lavoie tell you whether or not Agent Meadows had given him the source of Agent Meadows' information?

A I'm sorry. Would you ask that again?

Q Did Mr. Lavoie, during this initial conversation [8] with you back on May 8, tell you whether or not Mr. Meadows told him how Mr. Meadows gathered this information in San Diego?

A I don't recall if he did at that time. I became aware of the means of his information, but I don't know if Mr. Lavoie told me or Mr. Meadows told me.

Q Going at it the other way: Prior to your arrival at South Station on May 10, 1973, would you tell us what investigative steps you took in an attempt to ascertain whether or not this trunk contained a controlled substance?

A Prior to May 10th?

Q Prior to your arrival at South Station and the events which accrued subsequent to that?

A Took no investigative steps to determine that.

Q Well, you did call Agent Meadows, did you not?

A Yes, sir, I did.

Q You did call AMTRAK officials, did you not?

A I didn't, no, sir. I am not aware that anyone from my office did.

Q Well, you know that AMTRAK officials checked the trunk at another stop on the route to Boston?

A I'm sorry. I thought you asked if we checked to determine whether there was marijuana in the trunk.

Q What I'm trying to get generally from you is what [9] steps were taken in this general investigation regarding the trunk itself. Let's stay with any interaction between you and Agent Meadows. Did you call him?

A Yes, sir, I did.

Q How many times did you speak to Agent Meadows?

A On numerous occasions, all on the 8th, 9th and 10th of May in 1973.

Q Did Agent Meadows ever tell you how he gathered the information which Mr. Lavoie communicated to you back on May 8?

A Yes, sir, he did.

Q What did he tell you?

A He obtained his information, his first information in connection with Mr. Machado and the trunk, from an AMTRAK official at either San Diego, California, or Del Mar, California, which are two close towns, close in proximity, that the agent, whose name was not disclosed to me even to this date, at the AM-

TRAK office suspected that the trunk contained marijuana.

He said that based on his experience, that is, the AMTRAK official's experience, that this is the shipper and the method of shipment, plus the leaking talcum powder led the AMTRAK official [10] to suspect that it might contain contraband and probably marijuana, and that information was relayed to the San Diego agent, Scott Meadows, who in turn apprised us of the situation.

At the time that Agent Meadows learned of the shipment it was already en route to Massachusetts on the train.

Q In other words, Agent Meadows was told by AMTRAK after the train left, according to what Agent Meadows told you?

A To the best of my knowledge, that is the way it occurred.

Q Was one of the indicia relied upon by Agent Meadows the weight of the trunk?

A Yes, sir, it was.

Q What was that weight, do you recall?

A 195 pounds.

Q Was another indicia the talcum powder?

A Yes, sir.

Q Was a third indicia the description of the individual who sent the trunk?

A Yes, sir, I believe it was.

Q Just for the record, what was that description as it came to you?

A It was a physical description, that the subject was [11] 5 foot 8, a hundred and some pounds, had a full beard, dark hair, was dressed in dungarees. I believe it was described as dirty attire.

Q Was he with anyone according to what Agent Meadows told you?

A According to his ticketing information, he was with a person. I don't recall that anyone ever saw the person he was with.

Q What was the source of that ticketing information?

A The same individual who reported the trunk.

Q The AMTRAK official?
A Yes, sir.
Q Did you ever speak to that AMTRAK official?
A No, sir, I didn't.
Q Did you ever speak to any AMTRAK officials in California?
A No, sir.
Q Is the only AMTRAK official you ever personally spoke to those in Massachusetts?
A Yes, sir.
Q Did Agent Meadows ever tell you that he, as well as the AMTRAK officials, suspected there was marijuana in that trunk?
A I believe he told me that.
Q You agreed with that suspicion, did you not?
[12] A I agreed with the basis for his suspicion.
Q You felt the suspicion was sufficient to justify an expenditure of men and energy at South Station on May 10, did you not?
A Yes, sir, I did.
Q And did Agent Meadows ever tell you whether or not he ever spoke to any civilian other than the AMTRAK official between May 8 and May 10 regarding the origin of this trunk or any of the circumstances surrounding it?
A I am not aware of it; at least I don't recall it if he told me that.
Q To the best of your recollection, the only source of Agent Meadows' information was AMTRAK officials?
A To the best of my recollection, yes.
Q Have you talked to Agent Meadows since May 10th?
A Yes, sir.
Q Have you discussed the bases of Mr. Meadows' information since May 10th?
A No, the conversation that I had only dealt with the result of our investigation.
Q You have never put the question to Agent Meadows: "Did you have any other information regarding this trunk but the AMTRAK officials," have you?
A I don't believe I have, no, sir.

[13] Q Did you gain knowledge as to the schedule of this train?
A Yes, sir, I did.
Q Who gave you that knowledge?
A I believe it was Officer Robert Walsh of the Penn. Central Police Department.
Q When did you first communicate with him?
A I could not say the date, sir. I don't recall. Between May 8 and May 10th.
Q Was it before May 10th, to the best of your recollection, before the last day?
A I don't know, sir. I know we definitely talked about it on May 10th.
Q Do you have any notes that would refresh your recollection?
A No, sir.
Q When you were talking to Agent Meadows, did you make any notes simultaneous with your conversations with Agent Meadows?
A Yes, sir, I would have.
Q Are those notes available to you today?
A They would only be as they appear in the report. I incorporated my notes into the report.
Q Is there anything in the report that would refresh your recollection regarding the specifics that came [14] out of your conversations with Agent Meadows that you haven't related to us today?
A I'd have to look at the report, sir.
Q Would you do that over lunch?
A At lunchtime? Certainly.
Q Thank you.
Is it fair to say that prior to 7:00 p.m. on May 10th you discovered that this train stopped at various locations across the country? Didn't you?
A Yes, sir.
Q Did Agent Meadows ever tell you about the train schedule?
A Not that I recall.
Q Do you recall where the train stopped?

A I know of two places it definitely stopped: New Haven, Connecticut, and Route 128 in Massachusetts.

Q You don't know whether it stopped at New York?

A I don't know for sure. It probably did, but I can check my report for that aspect of it if I have it noted.

Q Is it fair to say that there are detector dogs in San Diego? Are there not?

MR. COHEN: Objection, your Honor.

THE COURT: If he knows.

MR. COHEN: The relevance of the question. [15] What happens in New Haven—

THE COURT: It may not have any relevance, but let me at least hear it anyway.

THE WITNESS: I'm sorry.

Q You are aware of the presence of detector dogs who perform the same functions, you know, which are resided in San Diego, California, are you not?

A Only in the San Diego area, actually San Ysidro, which is on the border, 30 miles south.

Q And. similarly, they have dogs in New York?

A I believe so.

Q And in New Haven?

A New Haven would be new information to me.

Q Your notes also might refresh your recollection on any information you gained and when you gained it regarding the stops that this train made between California and Boston?

A Yes, sir, they would.

Q Okay. You will look for those during lunch also?

A Yes, sir, I will.

Q Did it ever occur to you to order the AMTRAK officials or to suggest to other agencies or other offices of your agency that at various stops along the train route to have dogs attempt to detect this trunk and whether it contained substances?

[16] A No, it did not occur to me to do that.

Q You never called anyone and requested that, did you?

A I don't recall having done that.

Q And do you know whether or not any other agent in your office did it?

A No, I'm quite certain no one made any attempt to have that done.

Q Were you in charge of this investigation, sir?

A No. I can best say I was a principal in it as opposed to being in charge of it.

Q Agent Lambert was in charge?

A Yes, sir. He was the agent in charge. I was handling the case at the time.

Q Prior to your arrival at South Station, what other agents were involved in the preparation of this case and attempts to discover the source and the result of this trunk?

A Outside—I don't know anyone except Agent Meadows in California. There may have been other ones in California.

Special Agent Paul Lavoie here in Boston.

Special Agent Paul Lambert, who was also the special agent in charge of the Office of Drug Abuse Law Enforcement.

And myself. There were other agents that [17] ultimately worked on it, but I believe we did the primary work on it.

Q And there is one file which would contain reports from all these agents, is there not?

A I'm sorry, sir.

Q Your file contains any reports written on this case by any agents involved in it from the Boston office?

A Yes, sir. It does.

Q And you will check that file to see whether or not, you know, when the schedule was, when you first gained knowledge about that, right, over lunch, right?

A I will check it, yes, sir.

Q Did you ever hear the name Joe Chadwick mentioned on May 8, 1973?

A No. sir. I did not.

Q Did you ever hear it mentioned on May 9th?

A No, sir.

Q Did you ever hear it mentioned until you arrested him on May 10th?

A No, sir.

Q The descriptions which you gained from California—you ended up identifying Mr. Machado as the person fitting the descriptions which Mr. Meadows gave you and to Mr. Lavoie, did you not?

[18] A That's correct, sir.

Q And there was no mention of Mr. Chadwick's name in any of your information which came to you prior to May 10th?

A No, sir.

Q And there was no information about any third person other than Mr. Machado and his traveling companion, which came to you prior to your arrival at South Station?

A No, sir.

Q That is correct, isn't it?

A There was no information—

THE COURT: You're saying there was no information given to you about any third person?

THE WITNESS: That's correct, your Honor. I had not received any such information.

Q By "third person" I mean other than about Mr. Machado and his traveling companion?

A That's correct, yes.

Q What time did you arrive at South Station?

A I believe around 6:50 p.m. on the 10th of May.

Q What time was the train due?

A It was originally scheduled to arrive somewhere around 7:50 p.m.

Q What time did it arrive?

[19] A At 8:50 p.m.

Q Did you observe Mr. Machado get off the train or a person fitting Mr. Machado's description?

A No, sir.

Q Did you observe him at South Station at any time?

A Yes, sir, I did.

Q When did you first observe him?

A Within five or ten minutes after the train arrived at the South Station terminal.

Q Did you observe him make a phone call at any time during that?

A Yes, sir, I did.

Q What time did he make the phone call?

A Between the time of arrival at 8:50 and 9:00 o'clock, I believe.

[20] Q Do you know who he called at that time? At that time did you know who he called?

A No, sir, I did not.

Q You didn't watch him dial numbers?

A No, sir.

Q You didn't overhear any conversation?

A No, sir.

Q In fact prior to the arrest of Mr. Chadwick, you had no idea who he called?

A No, sir, I did not.

Q You saw Mr. Chadwick come to the station, is that right?

A Yes, sir.

Q You don't know of any information as to whether or not—at that time you didn't know whether someone had asked Mr. Chadwick to come or whether Mr. Chadwick came on his own? You have no idea—strike that question.

You have no personal knowledge as to whether or not Mr. Chadwick was called by Mr. Machado prior to the arrest of Mr. Chadwick?

A That's correct. I did not have any such information.

Q Where was Mr. Chadwick when you first saw him?

A When I first saw him, he was walking in the [21] South Station train terminal to a point where Mr. Machado and the co-defendant Brigitte Leary were seated, and subsequently met with them.

Q Do you know whether any agents were outside and saw Mr. Chadwick drive up?

A I don't recall, I don't believe that occurred.

Q It is fair to say there was no surveillance on Mr. Chadwick prior to this arrest?

A That's fair to say, yes, sir.

Q What did you observe him do?
THE COURT: You are talking about Chadwick?
Q Yes.
A I first observed Mr. Chadwick walk up to Mr. Machado and Miss Leary and they had stood together, looking like they were talking to one another, and then Mr.—
THE COURT. Excuse me just one second.

(Discussion off the record)

THE COURT. You saw Mr. Chadwick walk up to Mr. Machado and—
THE WITNESS. And Miss Leary, your Honor, L-e-a-r-y, Brigitte Leary, and they engaged in conversation for a moment. Then Mr. Chadwick left the South Station terminal and went out through [22] the Summer Street-Atlantic Ave. entrance to his car.
Q This is the first time you had any knowledge of the existence of Mr. Chadwick?
A That's correct.
Q And it is fair to say no one was waiting for Mr. Machado when the train arrived?
A I can't say that.
I didn't observe him meet anyone else.
Q And the train was about an hour late?
A Yes, sir, it was.
Q Did you see Mr. Machado claim the trunk?
A Yes, sir, I did.
Q Mr. Chadwick wasn't in the station at that time, was he?
A I don't know, sir.
Q You hadn't seen Mr. Chadwick at the time Mr. Machado got the trunk, did you?
A No, sir, I didn't see him.
Q Mr. Chadwick came after Mr. Machado and Miss Leary and the trunk were all together?
A I can't say when he arrived.
Q The first time you saw Mr. Chadwick was after Mr. Machado and Miss Leary and the trunk were all together?
A That's correct.

[23] THE COURT. Excuse me.
When you saw Mr. Chadwick, Miss Leary and Mr. Machado were talking, and was the trunk also within your view?
THE WITNESS. Yes, sir, it was.
Q At some point you saw Mr. Machado and/or Miss Leary claim the trunk and a red cap delivered it to them, is that right?
A I saw them claim the trunk off the baggage cart, and they placed it next to a no longer used magazine stand, and then subsequent to that a red cap.
Q Did you see them claim the trunk?
A Yes, I did.
Q Did you see them show documentation to whoever was in charge of the luggage at that time?
A I observed them hand a piece of paper to the driver of the baggage car. As a result of that activity, the trunk was unloaded and they moved it over to a position where they sat on it.
Q From the time that they received the trunk from the luggage people—by "they" I mean Machado and Leary—to the time the arrest was made, you never saw the trunk open, did you?
A No, sir, I did not.
[24] Q You never saw any talcum powder even leaking from the trunk during that period of time, did you?
A I don't recall, sir.
THE COURT. You don't recall one way or the other?
THE WITNESS. I do not recall, your Honor; I hesitate to say "yes," because I don't remember.
THE COURT. You don't remember one way or the other?
THE WITNESS. Yes, sir.
Q What time did you make the arrest?
A Approximately 9:00 to 9:10, right in that area, p.m.
Q Approximately how long after you first saw Mr. Chadwick did you make the arrest?
A Within five minutes, I would estimate.

Q There was no conversation prior to the arrest of Mr. Chadwick, was there?
A With whom, sir?
Q Between you and Mr. Chadwick?
A No, sir.
Q And you are not aware of any conversation between Mr. Chadwick and any agent prior to his arrest, [25] are you?
A No, sir, I am not.
THE COURT. I may have missed something.
You made an arrest of Mr. Machado and Leary at 9:10 p.m.
THE WITNESS. And Chadwick.
THE COURT. All three of them at 9:10?
THE WITNESS. Correct, approximately 9:10.
THE COURT. You arrested them all at the same time?
THE WITNESS. Yes, sir.
Q At that time the sole basis for your arrest of Mr. Chadwick was that he was there with Mr. Machado and Miss Leary, is that correct?
A And in possession of the trunk with marijuana.
Q The trunk at some time was taken outside the station, right?
A Yes, sir.
Q And who was it taken outside by?
A A red cap actually physically transported it outside. He was accompanied by Mr. Machado and Miss Leary, who joined Mr. Chadwick at the rental vehicle that Mr. Chadwick had driven to the South Station.
[26] Q You had no evidence he drove the rented vehicle to the South Station, did you, at that time?
A No, I didn't.
Q He was with the car, Mr. Machado, Leary, and the red cap and trunk came up to the car, is that correct?
A Correct.
Q And what happened from that point?
A Miss Leary, I believe, entered the passenger side of the front of the car and Mr. Chadwick and Mr. Machado and the red cap all put the trunk in the—

that is the steamer trunk—into the trunk of the vehicle that was waiting there.
THE COURT. Who did this now?
THE WITNESS. The red cap, whose name escapes me at the moment, assisted by Mr. Machado and Mr. Chadwick loaded the steamer trunk into the trunk of the vehicle.
THE COURT. Okay, let's take a break here.
MR. WEINBERG. May I have one more question?
THE COURT. Yes.
Q This happened at nine o'clock?
A Approximately.
Q Directing your attention to the information you had [27] prior to nine o'clock, have you told us every information, every particle of information you had which would suggest to you that Mr. Chadwick knew what was in the trunk?
In other words, did you have any other information that you felt persuaded you that Mr. Chadwick knew what was in the trunk at the time you arrested him or have you told us everything?
A I believe I have told you everything, yes.
THE COURT. 2:20.

[28] AFTERNOON SESSION

RICHARD G. CHRISTOPHER, Resumed

DIRECT EXAMINATION

BY MR. WEINBERG (Continued)

Q Are you the same Agent Christopher that testified prior to the break?
A Yes, I am.
THE COURT: Are the witnesses all sequestered?
MR. COHEN: That's correct.
Q Just to clear up a few points, you found out about the fact that the train was going to arrive in Boston on May 10th—you found that fact out on May 8th?
A Yes, sir, I did.

Q That fact was found out at least 48 hours in fact before the train did arrive?

A Yes, sir, it had been found out.

Q To clear up one other thing, while in the station, at approximately 9:00 p.m., you and the other agents associated with you had a dog named Duke there, is that correct?

A Yes, sir, it is.

Q And that dog made various passes at the trunk?

A Yes, sir, he did.

Q And that dog reacted or alerted to that trunk, did it [29] not?

A Yes, sir. He did.

MR. WEINBERG: At this point, your Honor, I am not going to contest the reliability of that dog or the fact that that dog is a reliable indicator of the presence of contraband. Mr. Cohen and I have entered into a stipulation. I hope that covers it.

Q Mr. Machado spoke not only to Mr. Chadwick but also to a redcap, did he not?

A Yes, sir, he did.

Q Did you observe that conversation?

A I imagine I did when I saw him speaking to the redcap.

Q And the redcap took the trunk physically and with Mr. Machado brought it out towards the vehicle which Mr. Chadwick was seen standing next to?

A That's correct.

Q After the arrests you searched all three of the defendants, did you not, you and other agents?

A Yes, sir.

Q And you in fact found on Mr. Machado keys to that trunk, did you not?

A Yes, sir.

Q And you also found the receipts and documents which he had proving that was in fact his trunk?

[30] A Yes, sir.

Q Nothing connecting Mr. Chadwick and that trunk in terms of documentation or keys was found pursuant to your search incident to Mr. Chadwick's arrest, was there?

Rephrase the question: Did you find any keys on Mr. Chadwick, any keys which fit the trunk when you arrested him, searched him?

A No, sir. We found keys on Mr. Chadwick, the duplicate of which or a similar type key was found also in Miss Leary's possession. I don't recall what key. I believe it was a safe deposit box key possibly. I don't think it was a trunk key. But there were two keys that were the same.

Q The answer is: No key on Mr. Chadwick fit the trunk, did it?

A No. No key on him fit the trunk.

Q And no document on Mr. Chadwick which in any way indicated ownership or possession in that trunk, is that correct?

A No, sir. There were no documents.

Q Those searches were subsequent, not precedent to the decision to arrest Mr. Chadwick?

A They were after the arrest.

Q When you arrested Mr. Chadwick, he was handcuffed [31] pursuant to the Bureau of Narcotics' procedure at that time?

A That's correct.

Q And he was placed into a vehicle, is that right?

A Yes, sir.

Q Who else was in that vehicle?

A Mr. Machado, myself, and Penn. Central Police Officer Robert Walsh.

Q Mr. Walsh then read Mr. Machado and Mr. Chadwick their rights, did he not?

A Yes, he did.

THE COURT: What happened to Miss Leary?

THE WITNESS: Miss Leary was transported in a separate vehicle, your Honor, because of the fact she was a female. by two other agents.

THE COURT: In this one vehicle you had Machado, Chadwick, yourself and a Penn. Central—

THE WITNESS: A Penn. Central Railroad police officer by the name of Robert Walsh, W-a-l-s-h.

Q You didn't read the Miranda card to Mr. Chadwick or Mr. Machado while in the vehicle en route to the JFK Building from the point of arrest, did you?

A No, I did not.

Q Did you hear Mr. Walsh read them to him?

A Yes, I did.

[32] THE COURT: Mr. Walsh is a Penn. Central policeman?

THE WITNESS: Yes, sir, he is.

Q And did you see Mr. Walsh reading off a card?

A I did.

Q And do you recollect that Mr. Walsh informed Mr. Chadwick and Mr. Machado of all the various rights contained on that card?

A Yes, sir. He did.

Q Did either you or Mr. Walsh ask Mr. Chadwick whether or not he understood those rights?

A Yes, sir.

Q Who asked him?

A I asked him.

Q Did you ask him whether he waived those rights?

A Yes, sir. I did.

Q And what did Mr. Chadwick say?

A He did not waive his rights.

Q And that occurred in the car?

A Yes, sir.

Q That occurred prior to the conversation between you and Mr. Chadwick?

A Yes, it did.

Q So you asked Mr. Chadwick whether he understood and waived his rights and Mr. Walsh read them their [33] rights; is that a fair statement of what happened?

A That's correct.

[34] THE COURT. And he said he did not waive his rights?

THE WITNESS. No, your Honor.

In his answer to his questions, I said Mr. Chadwick did not say "I waive my rights."

I only informed him he could waive them, and he did not indicate to me he would or did waive them.

Q Did he remain silent?

A He acknowledged that he knew he could waive them.

Q Tell me—

THE COURT. You say he did not waive them?

THE WITNESS. No, he did not, your Honor.

THE COURT. He didn't say anything one way or the other, just remained silent? After the rights were given, you asked him if he understood them?

THE WITNESS. Yes.

THE COURT: And you then asked him what?

THE WITNESS. I asked him if he understood he could also waive the rights. And he said: yes, he understood that.

And to my knowledge, I did not ask him if he did waive them. I may have, but I don't [35] recall if I did.

Q Just to clear it up so there is no ambiguity;

After Mr. Walsh read the Miranda rights to Mr. Chadwick, what did you then say to Mr. Chadwick?

A I then went over the Miranda rights sentence by sentence and asked Mr. Chadwick and Mr. Machado together if they understood each facet of the Miranda warning.

Q Did you repeat every word on the card?

A Yes, I did.

Q Or did you ask: "Do you remember Mr. Walsh read you your rights as to counsel, do you understand you have a right to counsel?"

A No, I read every sentence over and asked if he understood them.

Q It is your testimony that in the vehicle both you and Mr. Walsh read the Miranda card to Mr. Chadwick and Mr. Machado?

A That is corrrect, yes.

Q And that all that occurred subsequent to the arrest?

A Yes, sir.

Q Who was sitting where in the car, sir?

A I was seated behind the wheel. Mr. Walsh was seated in the front seat, that's Officer Walsh, on the [36] passenger side.

Mr. Machado was directly behind me; and in the rear seat, on the passenger side in the rear seat was Mr. Chadwick.

Q Who arrested Mr. Chadwick? Who physically placed him under arrest?

A I don't know, sir. There were several officers there. It was sort of a simultaneous situation.

Q It is fair to say when Mr. Chadwick was arrested, someone told him: you are under arrest for possession and with intent to distribute marijuana?

A No, sir.

Q Let me see if I can refresh your recollection:

Directing your attention to page 45 of a hearing held before the magistrate on 30 January, 1974, do you recall being a witness at two other hearings before Magistrate Davis on this matter?

A Yes, I do.

Q And do you recall Mr. Kevin Keating asking you questions on January 30, 1974?

A I don't know if I know Mr. Keating, but if it is here, I assume he must have been the attorney. I don't recognize the name.

MR. WEINBERG. If I could have just a second, your Honor?

[37] Q Showing the witness page 45 of the transcript and see if you refresh your recollection from the second question down to the fourth question.

A I have read that.

Q Do you recall at the point where Mr. Chadwick was arrested informing him of the charges against him?

A I don't know if I stated the specific charges. I might have given a general situation like—I know I said to him quite openly and clearly: you are under arrest. And probably I would have told him it was in connection with being in possession of marijuana, but I wouldn't have given him a citation of a statute.

Q The word "marijuana" was used when you told him he was under arrest and what for?

A I can't recall.

Q To the best of your recollection?

A I simply don't recall.

Q Do you recall being asked:

Q On the street?

A On the street.

Q Did you inform the individuals what they were arrested for, did you?

A Did I?

[38] Q Yes?

A I informed the Defendant Chadwick and the Defendant Michado of the charges, but I don't recall whether it was on the street or inside the car, potential charges, I should say."

Do you recall giving those answers to those questions on January 30, 1974?

A Yes, I do.

Q And you are saying today in September 1974 you have no recollection of the words you used subsequent to saying to Mr. Chadwick "you are under arrest"?

A At this time I do not recall.

Q It is fair to say you may have said "you are under arrest for marijuana"?

A I really don't believe I would have said that because I didn't know what was in the trunk.

Q You didn't know what was in the trunk?

A No, I didn't.

Q You made the arrest for some purpose, did you not?

A I had reason to believe there was a controlled substance in the trunk, but I did not know it was—

Q You can't arrest somebody unless you are arresting him for a violation of some certain statute.

MR. COHEN. I object. He answered the question.

[39] THE COURT. He may have it.

THE WITNESS. I'm sorry, your Honor, I didn't hear it.

Q You arrest somebody because you have reason to believe he violated a certain law of the federal government, right?

A Yes, sir.

Q And the law you felt he violated at that time was the law prohibiting the possession of marijuana?

A That's what I felt, yes, it is true.

Q And it is just your current practice to tell a person when he is arrested what he is arrested for, right?

A Normally, yes.

Q And you have no recollection about the specific time whether or not you followed your current practice?

A On the street I doubt if I said the word "marijuana."

I might have used "controlled substance," because I had good reason to believe there was a controlled substance in there. After arrival at the office and an examination of the substance, it was kind of obvious, and I probably I told him "marijuana".

[40] You might have used the words "controlled substance" on the street?

A Yes, I believe that would be it.

Q Do you believe you did?

A If any word, it would probably have been that.

THE COURT. Are you guessing now? Do you have any memory?

THE WITNESS. No, sir, I do not have a memory on it.

Q Tell us everything that transpired—how long was the ride between South Station and JFK Building, approximately?

A Five minutes, perhaps.

Q After hearing Mr. Walsh read the rights and after you went over the rights with the defendants, tell us everything that transpired, all the conversation between you and either of the defendants from the time you got into the car until the time you arrived at the JFK Building.

MR. COHEN. I object only as to it is limited to this defendant, what was said between this witness and Mr. Machado is not relevant to this hearing.

THE COURT. I think it is, go ahead, as long as it was said in the presence of the defendant.

[41] THE WITNESS. I asked the defendant Mr. Chadwick his name, and he gave it to me.

I asked the defendant Machado his name, and he refused to answer.

I then asked Mr. Chadwick how it came to be that he was—where he was from? And he said, Salem, New Hampshire.

I asked him why he was all the way down here from Salem, New Hampshire? And he said that Mr. Machado had called him.

He asked me how I knew what was in the trunk. And I told him that he had it wrong; I asked the questions.

I asked him how he knew what was in the trunk, and he didn't answer. He said he didn't know what was in the trunk.

I asked him what his phone number was.

He said he didn't have a phone.

Then I asked him how he could get a call from Mr. Machado?

He said that everything that he said I was twisting, and he didn't care to answer any more questions.

Q This is all the conversation in the car, right?

A To the best of my knowledge, recollection, that was [42] all that took place.

Q Was there any conversation in the car after Mr. Chadwick said he wouldn't answer any more questions?

A Not between Mr. Chadwick and myself.

Q Did you hear any conversation between Mr. Chadwick and anyone?

A I don't recall any other conversation.

Q Then you took Mr. Chadwick to the JFK Building and put him through the booking process, is that correct?

A Yes, sir, I did.

Q Was there any further conversation at the JFK Building?

A Yes, sir.

I took routine booking information—name, address, and so on.

At that time Mr. Chadwick stated that he lived, I think it was 100 Riverway in Brookline or near Boston. I don't recall if it was Brookline or not.

I again asked him for his phone number at that address. He said he had no phone.

I asked him how he got the phone call from Mr. Machado. He said he received it on the phone of a friend who lived in the apartment above [43] him at 100 Riverway, that would be the third floor apartment.

And I believe I asked him how he knew to be at that phone at that particular time to receive a call. I don't believe he responded to that question.

I don't think there were any other questions other than booking information asked of him.

Q Were the Miranda rights repeated to him at the JFK Building to the best of your knowledge?

A Yes, they were.

Q Who repeated them?

A I did.

Q Did he sign the BNDD form for waiver of rights, if you know?

A I don't believe he did.

Q Directing your attention back to the South Station at approximate'y 9:00 p.m. on May 10, 1973, you observed the porter and Mr. Machado carrying this trunk to a vehicle next to which Mr. Chadwick was standing, is that right?

A That's correct.

Q And then you saw this trunk placed on to the vehicle, placed in the trunk of the vehicle?

[44] A Yes, sir.

Q Who did the placing, do you recall? Did you specifically observe who placed the trunk?

A Yes, sir, I did.

Q Who did?

A The red cap did the majority of the lifting. Mr. Machado and Mr. Chadwick at the very least guided—I don't know how much weight they assumed—but they did handle the trunk.

Q How many police officers or other agents under your control were present in the area?

A Perhaps six altogether.

Q Were all six of them present at the time the train got in?

A Yes, sir.

Q And all six of them were in the area when the trunk was placed in the train and taken through the baggage procedures and until Mr. Machado took physical possession of it, is that right?

A They were all in the area of South Station, not all inside.

Q Were you in control of this group as a group agent?

A No, sir.

Q Who was in control at that time?

A Special Agent Lambert, Paul Lambert.

[45] Q And with the exception of Mr. Chadwick and the redcap and Miss Leary, no other individuals were seen talking to Mr. Machado from the time you first observed him on the evening of May 10th until the time of the arrest; is that true?

A Are you asking: Seen talking to Mr. Machado?

Q Yes.

A I can't say. There were some other persons seen talking to somebody there, but I don't know which of the three people were involved. I think there was a female present.

Q It's your recollection there was a female who talked to either Mr. Machado or Mr. Chadwick or Miss Leary?

A That's correct. On the street also. I believe that occurred on the street.

Q That occurred while the trunk was being taken to the car?

A Yes.

Q Prior to the time the trunk was taken out of the station, you saw no one else but Miss Leary, Mr. Chadwick and the redcap talking to Mr. Machado?

A That's correct.

THE COURT: I want to make sure I understand this. You say one other person talking to Machado [46] and Leary?

THE WITNESS: No, sir. I was informed that another person, a female, had walked up to one of those three individuals. I did not observe it myse'f. But she was determined not to have been in the problem at that time.

Q She was what? I didn't hear that last.
A We determined that she was not involved in the violation at that time.
Q But the information you received is that she talked to somebody outside the station after the trunk was in the process of being removed from the South Station toward the rented vehicle?
A I don't know what point of time it occurred. It occurred from the time Mr. Chadwick arrived, because this girl talked to one of these three or approached one of the three.
THE COURT: In other words, you don't know whether she was discussing which way the train station or what time it was or what have you?
THE WITNESS: Exactly, your Honor.
THE COURT: You are satisfied that she was in no way connected with the three individuals that are defendants in this case; is that it?
THE WITNESS: That is correct, your Honor.
[47] Q At the time the defendants were arrested, where was the trunk?
A The trunk, sir?
Q Yes.
A In the trunk compartment of the Dodge Polara, a vehicle that Chadwick had driven.
Q Where was Mr. Chadwick when he was arrested?
A At the back of the vehicle.
Q Was the trunk closed?
A No, sir. It was—
MR. COHEN: Excuse me, your Honor. Could we define "trunk"? There is a foot locker trunk and there is a car trunk.
THE COURT: For my sake, why don't you call it the foot locker trunk. The foot locker trunk was where in the Dodge Polara?
THE WITNESS: The foot locker trunk was in the baggage compartment of the passenger vehicle, that is, the back of the vehicle.
THE COURT: You use the word "trunk."
THE WITNESS: All right, sir.

THE COURT: For the record, the word "trunk" alone from here on it will mean that portion of the car which is used for storage.
"Foot locker trunk" will mean the box [48] that these defendants allegedly carried or had carried from the South Station. Go ahead.
Q Where was Mr. Machado when he was arrested?
A I'm sorry, sir.
Q Where was Mr. Machado—
THE COURT: So the trunk of the car was opened?
THE WITNESS: Yes, sir. The trunk of the vehicle was opened.
Q Where was Mr. Machado?
A He was also at the back of the vehicle.
Q Near the trunk of the car?
A Yes, sir.
Q Where was Miss Leary?
A I believe she was seated on the passenger side of the front seat of the vehicle.
Q Did you use any guns when you arrested them?
A You mean did we discharge them?
Q No. Were guns out when you went up to them and made the arrest if you recall?
THE COURT: Did you have a gun in your hand?
THE WITNESS: I didn't have one, no, sir. I was a little bit further back than most. I'm sure there was a gun out.
[49] THE COURT: Did you see a gun displayed?
THE WITNESS: I believe so, your Honor. I don't have much doubt about it.
Q Okay. What happened with Mr. Chadwick physically after the initial words "You're under arrest" occurred?
A He was placed in handcuffs.
Q That was the first thing that was done?
A With all three defendants, yes.
Q How many seconds, if you can estimate, did it take from the time they were told they were under arrest until the time they were handcuffed?
A Less than 30.

Q Then what happened to them? Where did the officers take them?

A I took Mr. Chadwick and Mr. Machado in the back of my government vehicle, and the young lady, Miss Leary, was taken to another government vehicle.

Q So within a matter of two minutes, let's say, all three defendants were inside government vehicles?

A That's correct, sir.

Q And what remained was this Dodge Polara with a foot locker trunk in it, is that correct?

A It was still there, yes.

Q The defendants were frisked, were they not, at the [50] site of the arrest?

A The men were, yes.

Q There were no guns or weapons on them?

A No, sir.

Q Where did the frisk take place?

THE WITNESS: On the street outside the government vehicle. They were turned around, told to lean against the car.

THE COURT: The first thing that happened was you placed them under arrest?

THE WITNESS: Yes, sir.

THE COURT: The second thing that happened was that you handcuffed them?

THE WITNESS: Yes, sir.

THE COURT: The third thing that happened was you frisked them?

THE WITNESS: No, sir. Actually they were frisked between being verbally told of their arrest, put up against the car, hands put behind them and—

THE COURT: Searched and then handcuffed?

THE WITNESS: Put up against the front—or the side of the car.

I can't say which end, but I know it was against the side of the vehicle.

[51] Q So they were taken to the side and put up against the car and frisked?

A To the best of my knowledge, that's the way it occurred.

Q Is it fair to say the trunk ws locked at the time?

A The foot locker trunk was locked.

Q Foot locker trunk was locked. There was no risk to any of the officers at the time the defendants were handcuffed, is that correct, in terms of any guns or weapons being inside of the trunk?

That question was poorly phrased.

It was a bulky trunk, wasn't it?

A The foot locker trunk?

Q Yes, the foot locker trunk.

A It was a large trunk, yes.

Q What were the dimensions?

A Approximately two and a half feet wide and two feet high and three feet long. It was a shipping trunk, commonly used in the old steamer days.

Q Weighed about 200 pounds?

A Yes, sir.

Q Weighed more than any of the three defendants individually weighed?

A I don't recall their weight, sir.

[52] Q And you ascertained that the trunk was in fact locked, right?

A Yes, sir. The foot locker trunk was locked.

Q Did you notice the kinds of locks on the foot locker trunk?

A Yes, sir, I did.

Q What kind?

A One was a padlock—that had a padlock over the regular trunk latch. It's a double locking system there.

Q Did you make these obsevations while the foot locker trunk was in the train station?

A No, I don't think I did.

Q When did you first make that observation if you recall?

A When we removed the trunk from the rental vehicle.

Q When you removed the foot locker trunk?

A The foot locker trunk, yes.

Someone may have reached there and jiggled the lock. I don't recall making the observation until we got back in the building.

Q When the defendants were arrested and placed in the government vehicles, what happened to the Dodge Polara? What was done there by any officers that you observed?

[53] I didn't observe anything in connection with the Dodge.

Q Did you see the foot locker trunk being taken out of the Dodge Polara?

A No, sir.

Q Who took, to the best of your knowledge, the foot locked trunk from the trunk of the Dodge Polara?

A I do not know.

Q The foot locker trunk was still in the Dodge Polara when you drove over with the defendants?

A Yes, sir, it was.

Q Did you ever go back to South Station that night?

A Yes, sir, I did. Or perhaps, early the next morning if not that night.

Q Was the Dodge Polara still there?

A No, sir. I don't believe it was.

Q Was the foot locker trunk there?

A At South Station, sir? No.

Q When did you next see the foot locker trunk after the arrest of the defendants?

A Sometime at around 9:30 p.m. at the ODALE office in the JFK Federal Building.

Q Did you learn who brought it in?

A No, sir. I didn't.

[54] Q Was it opened?

A At the time of its arrival?

No, it wasn't.

Q It was still in the same condition, to the best of your knowledge, that it was in while it was in the trunk of the Dodge Polara?

A Yes, sir, it was.

Q And this is approximately 9:30 or 20 minutes after the arrest of the defendants?

A What was that? I'm sorry.

Q The time that you first saw the trunk, the foot locker trunk, in the ODALE office?

A When we left the arrest scene the Polara vehicle was driven by an agent to the office at the same time the prisoners were taken to the office.

The foot locker trunk was taken into the ODALE office within moments or minutes of the prisoners being transported up there.

Q When was it opened?

A The time it was opened?

Q Yes.

A Between 9:30 at night and 11:00 at night. I don't recall for sure.

Soon after we arrived, I believe.

Q How many agents were in the ODALE office at 9:30, [55] when the trunk arrived, foot locker trunk arrived?

A I believe just myself and Paul Lambert.

Q The two of you were alone?

A You asked "agents." I assume you mean special agents.

Q Yes. Any other government personnel there?

A Not that I recall.

Q How about Mr. Walsh?

A Well, he's not government personnel. He was there.

Q Was he there?

A Yes, he was.

Q Any other railroad personnel?

A Yes, a Lieutenant Curley.

Q Any Boston Police Department officers?

A I don't recall, sir.

Q Where were the defendants at this time?

Were they in a holding cell?

A No. They were in the same office that the agents and the trunk was in.

Q Were they still handcuffed?

A They remained handcuffed for some short period until we started doing their personal histories.

Q Did you do their personal histories after or before the foot locker was opened?

A Some were being done during and one was done before. [56] As we could handle them, we did them. Everything was being done sort of at the same time.

Q When did you seize the keys to the trunk, to the foot locker trunk, from Mr. Machado?

A After the trunk was opened.

Q After the trunk was opened?

A Yes. I believe.

Q Is there a holding cell in the ODALE office?

A No, sir, there is not.

Q Where is the ODALE office?

A It's on the ground floor in the JFK Federal Building, on the end toward the Expressway.

Q That is the same floor that the Bureau of Narcotics and Dangerous Drugs Headquarters was in back in May of '73, wasn't it?

A Yes, sir. It is.

Q Do they have holding cells in the JFK Building?

A Not in the BNDD or the Drug Enforcement Administration.

Q Were there any BNDD officers in the BNDD office at that time if you know?

A There would have been at least one, the radio operator, but I don't know of any other agents.

Q Did you make any attempts to get a search warrant that night prior to opening the foot locker trunk?

A No, sir.

[57] Q And its fair to say that at this time, with the foot locker trunk in the ODALE office, there was no risk that whatever was contained in the foot locker trunk would be removed by the defendants or their associates; is that fair to say?

A At the time we were there together, that is a fair statement.

Q The foot locker trunk was under your control at that time and at all times subsequent to the arrest of these defendants, was it not?

A Yes, sir.

Q And prior to opening the foot locker trunk in the ODALE office, you made no personal perception of any

vegetable substance leaking out or otherwise being observable from this foot locker trunk, is that right?

A I don't know if you will count my observations in connection with the detector dog, but I saw no physical evidence outside of the response from the detector dog.

Q Did you see any talcum powder?

A Yes, I did.

Q You saw talcum powder, but you saw no vegetable matter leaking out?

A No, sir. I saw no vegetable matter.

[58] Q Did you or any other officer search the Dodge Polara with the exception of seizing this trunk, this foot locker trunk, from it?

A Not to my knowledge, sir.

Q And, certainly, there was no thorough search of the Dodge Polara when the foot locker—I take that back.

There was no consent to the taking of the foot locker trunk from any of the defendants, was there?

A No, not that I recall.

Q Just very briefly, just two or three more questions:

The arrest sequence from the time that the foot locker trunk was placed in the trunk of the vehicle until the time that the defendants were handcuffed—is it fair to say it took no more than 60 seconds?

A No.

Q How long did it take? How long was the foot locker trunk in the vehicle until you made the arrest?

A I think we waited for the redcap to get clear of the back of the vehicle. Might have been a minute, 2 minutes, 3 minutes. But not a very long time at all.

Q There were enough officers in the station to arrest [59] the three defendants, in the South Station, weren't there, if you wanted to?

A Yes, there were.

Q And the reason you didn't do it was that you wanted to see what vehicle they placed the trunk in?

A No, sir.

Q Why didn't you arrest them in South Station?

A We wanted to see if any other people were involved.

Q That's the only reason that you didn't arrest them at South Station and seize the foot locker trunk from South Station, is that right?

A That is correct.

Q It was a tactical decision on the part of yourself and Agent Lambert in an attempt to see whether there were any accomplices outside, is that right?

A Yes, sir.

Q And it had nothing to do with your ability to seize the trunk, be it in the station or in the automobile, right?

A Yes. It had nothing to do with that.

MR. WEINBERG: If I can just have one moment, your Honor.

[60] MR. WEINBERG. I have no further questions.

THE COURT. Where was the vehicle parked?

THE WITNESS. The Dodge Polara?

THE COURT. The Dodge Polara.

THE WITNESS. It was parked on Summer Street probably forty-five feet from the intersection with Atlantic Ave. facing South Boston.

I think there is a subway exit right there.

THE COURT. Was it at the curb?

THE WITNESS. Yes, sir, it was at the curb.

THE COURT. Was it at a place at the curb which is set aside for public parking or was there no parking there?

THE WITNESS. The parking restrictions might have been a taxi situation, your Honor, might have been for taxis, only. But I don't recall whether it was posted "no parking" or not.

THE COURT. With relation to the front of the South Station, there used to be a clock on the corner, do you krow what I am talking about?

THE WITNESS. Yes, sir.

THE COURT. So it appears to be a triangle [61] if you are looking at South Station from that front door.

THE WITNESS. Yes, sir.

THE COURT. Where was the car from there, if you were looking at what I call the front door?

THE WITNESS. If you stood at the curbing facing the front door, Atlantic Ave. and Summer Street entrance, the car would be to your left fifteen or twenty feet on Summer Street.

THE COURT. On the righthand side, the station side of the street?

THE WITNESS. On the station side of the street, yes, sir.

THE COURT. Headed in the right direction, right wheels to the curb?

THE WITNESS. Right side of the vehicle to the curb.

CROSS EXAMINATION

BY MR. COHEN

Q Agent Christopher, approximately what time was the first time you actually saw the trunk in South Station?

A Approximately five minutes till nine p.m.

Q Prior to that time, were you convinced in your own mind that the trunk contained marijuana?

[62] A No, sir.

Q And then thereafter the detector dog Duke was employed, is that correct?

A Yes, sir, he was.

Q At that time, sir, what was your understanding with respect to the abilities of Duke? Were his abilities limited solely to marijuana?

A No, sir, they were not.

Q And what was your understanding as to the capabilities of the detector dog Duke?

A He can detect marijuana, cocaine, procaine, and heroin.

Q You first saw the trunk at what time at South Station?

A Approximately five minutes of nine.

Q And the defendants were placed under arrest approximately what time?

A About ten minutes or quarter after nine.

Q And we are talking about a period of twenty minutes between the time you first saw the trunk and when the defendants were placed under arrest?

A Yes, sir.

Q And what was the time span between when Duke first alerted to the foot locker and the time of arrest?

A About ten or twelve minutes.

[63] Q Is it fair to say that that is the first time when Duke alerted that you had reason to believe that that trunk contained some controlled substance?

A Yes, sir.

MR. WEINBERG. Objection, your Honor.

THE COURT. What is the objection?

MR. WEINBERG. The grounds for probable cause are objective circumstances not subjective belief.

THE COURT. Well, it is what he thought, he is asking what he thought.

MR. WEINBERG. I object on the ground of relevance.

THE COURT. He may have it.

Twelve minutes before the arrest, Duke examined, if you will, the trunk, is that it?

THE WITNESS. Approximately that long, yes, sir.

THE COURT. And where did this examination take place?

THE WITNESS. I believe the track is No. 16. It would be at the farthest point in the South Station from Atlantic Ave., at that location there is a large train doorway that leads into the rotunda area from the track platform, and about [64] forty feet inside there, there is a magazine counter which is all enclosed and no longer in use. The defendants Machado and Leary placed the foot locker trunk against the wall on one corner of that magazine stand and sat on it after they picked it out, took it off the baggage car.

From that period—

THE COURT. They carried it off the baggage car?

THE WITNESS. The baggage handler and the man driving it removed it from the baggage car, and put it on the floor. And then they slid it over to the wall. From the point where they unloaded it to the time of arrest was approximately ten or twelve minutes.

THE COURT. All right.

When did Duke examine the box, the trunk?

THE WITNESS. Oh, five minutes after they—after it was unloaded from the train.

THE COURT. This was prior to its being removed from South Station?

THE WITNESS. Yes, sir, prior to being removed.

THE COURT. Tell me how that happened.

THE WITNESS. I sent the dog handler down [65] by the trunk and told him to let the dog go. He had done it twice on his own and didn't let the dog go because he was afraid the defendants would become aware of what was taking place.

On the third occasion, I told him to let the dog go and give him whatever instructions he had to to cause him to institute a search. He did that, and the dog went to the trunk and started scratching on it and giving what is considered a response or alert response to the controlled substance.

THE COURT. That was right in the presence of Mr. Machado and Miss Leary?

THE WITNESS. Yes, it was.

Then I told the dog handler as soon as he gave an indication of an alert to pick up the dog leash and walk him out of the building, which he did. Then he told me about it.

I informed the rest of the officers.

Q Now, sir, you said the arrest occurred at approximately what time?

A About 9:15, as I recall.

I think I said earlier around nine o'clock. At the time I was a little confused.

Q Do you recall the lighting conditions at that time?

[66] A The lighting conditions, sir?

Q Yes.

A Yes, sir.

Q Was it daylight or night at that time?
A It was dark.
Q It was dark?
A Nighttime.
Q When the defendants were placed under arrest, describe the circumstances in that general area.
A At the time of the arrests, there was considerable pedestrian traffic, motor vehicle traffic, and it was dark on the street corner—not well lit for purposes of observation, anyway.
Q And at this time, sir, Special Agent Lambert was in—well, he was your boss so to speak, is that correct?
A Yes, sir, he was.
Q Was there any conversation between you and Special Agent Lambert concerning gaining access to the trunk, the foot locker trunk?
A Yes, sir, there was.
Q Relate that conversation, please: what you said to Agent Lambert and what Agent Lambert said to you.
A Agent Lambert said that we were going to take the [67] trunk into the office to open it because there were too many people on the street. He didn't want to have the defendants and the merchandise out in among the public view and, therefore, we ordered the, whole works to be taken back to the office including the defendants.
Q And to your knowledge another agent drove the Polara with the foot locker trunk back to the office where it was opened, is that correct?
A Yes, sir.
Q And that occurred at approximately what time, to the best of your recollection?
A About 9:15 that we went back to the office.
Q I'm sorry, what time was the trunk opened, the foot locker trunk?
A A little after 9:30, I guess.
MR. COHEN. I have no further questions, your Honor.
MR. WEINBERG. No questions, thank you.

PAUL L. LAVOIE, SWORN

DIRECT EXAMINATION

BY MR. WEINBERG

Q State your name, please?
A My name is Paul L. Lavoie.
Q And what is your present occupation?
[68] A Special Agent for the Drug Enforcement Administration, United States Department of Justice.
Q What was your occupation on May 10, 1973?
A I was a Special Agent for the Bureau of Narcotics and Dangerous Drugs at that time assigned to the office of Drug Abuse Law Enforcement.
Q And that was the same on May 8, right?
A Yes, sir.
Q Do you recall receiving a phone call from Agent Medows in San Diego?
A Yes, sir, I do.
Q And when did you first receive a call from him?
A On May 8, 1973.
Q About what time?
A I would only be guessing, perhaps early afternoon.
Q Early afternoon?
A Yes.
Q Did you take any notes contemporaneously with receiving this phone call?
A I may have.
Q Do you have them with you?
A No, sir.
Q Do you know where they are?
A In all probability, if I did in fact take notes, they were destroyed.
[69] Q How many conversations did you have with Agent Medows?
A At least, one, perhaps, two.
Q Would they both have been on May 8, 1973?
A I believe so.

Q What did Mr. Medows tell you and what did you tell him to the best of your recollection in both of these conversations?

A Agent Medows advised me at that time that there was a suspected shipment of marijuana en route from California to Boston.

He advised me that the suspected shipment was being shipped by the AMTRAK Railway System; that the shipment was contained in an old brown trunk which had been checked by Gregg Machado.

Q What did you do with that information?

A I passed it on to, I believe, my supervisor at the time and other agents in my group.

Q Who was your supervisor?

A Special Agent Paul Lambert.

Q Did you participate in the investigation of the brown trunk between May 8 and May 10, 1973?

A I participated in the investigation in the sense that I believe my role at that time, I tried to identify Mr. Machado.

[70] Q Did you ever call any AMTRAK officials on May 9 or 10 or May 8?

A I may have, I don't recall whether I in fact did or whether another agent did.

Q Did you subsequently sign an affidavit related to this case?

A Yes, sir, I did.

Q I show you this affidavit and ask whether or not that's an accurate reproduction of that affidavit you signed pursuant to a complaint in this case?

MR. COHEN. Your Honor, I wonder if the witness can be shown the affidavit filed with the court because there is no way this witness is going to know verbatim the exact affidavit.

THE COURT. I presume you two can satisfy yourselves whatever Mr. Weinberg is dealing with is a copy.

MR. WEINBERG. Let me show it to him.

MR. COHEN. There was a problem, two affidavits prepared, one was not filed.

This one is burned.

THE COURT. Do you have it here?

MR. COHEN. I agree what he has here is sufficient, he just wants to read one paragraph.

THE COURT. All right.

[71] Q Did you sign an affidavit, Agent, which contained the following information:

> "That on or about May 8, 1973, I received information from Agents of the Office of Drug Abuse and Law Enforcement in San Diego, California, which information was that reliable informants had reported to them that a large quantity of marihuana was being transhipped in a large old brown trunk via AMTRAK train from the West Coast to Boston?

A Again there are plurals in there, and I don't recall whether that is the affidavit or whether it was the second one that was filed.

THE COURT. What paragraph are you reading from?

MR. WEINBERG. The first paragraph, first five lines.

THE COURT. Do you want to look at what I have here?

MR. WEINBERG. Yes, please, your Honor.

MR. COHEN. I will stipulate what was read to the witness was in fact the affidavit filed in court.

THE COURT. All right.

MR. WEINBERG. I have no other questions.

[72] CROSS EXAMINATION

BY MR. COHEN

Q Sir, that affidavit was prepared after the arrest of the defendant, is that correct?

A Yes, sir.

Q In connection with the filing of a complaint before the magistrate?

A Yes, sir.

Q Do you recall which Assistant United States Attorney prepared the affidavit?

A I know initially I provided information verbally and an affidavit was prepared by Mr. John Wilbur, and it was later revised by Assistant United States Attorney Bill Brown.

Q And to your recollection, the one revised affidavit prepared by Mr. Brown was in fact filed in court, is that correct?

A To the best of my knowledge, that's correct.

Q Now, sir, the sentence which was read to you stated that you received or that San Diego had received information from reliable informants—and you signed that affidavit. Was that the fact that there were more than one informant?

A I believe the information given to me was that the information in question was provided by railroad officials, and probably an official, but the plural [73] was used in the affidavit. At this time I don't recall actually whether the source of information was reported to me as single or as plural.

Q What was your understanding of the information given to you by Mr. Medows?

A That information was produced to him by one person.

Q What is your recollection that Mr. Medows told you or Agent Medows told you concerning his source of information?

A I believe that he stated that an official—

Q And in that regard, the affidavit which he talks about "reliable informants" is incorrect, is that correct?

A That would be the case, yes.

Q Now, also, sir, the affidavit did not refer to an AMTRAK official but refers to "reliable informants," was there discussion with Mr. Brown as to the use of this word "informants" as opposed to "AMTRAK official"?

A I believe there may have been.

I was advised by Mr. Medows, Agent Medows, that he would prefer that the source of this information not be disclosed if possible. The word "informant" I believe was a word which I used which Mr. Brown agreed upon

using, also, simply to convey [74] a source of information.

Q And is it fair to say, sir, that the reason the term "informant" was used was because at that time AMTRAK officials had developed a profile for detection of shipments of contraband and that you did not want to reveal that profile.

MR. WEINBERG. If the witness knows?

Q If you know.

A I do not know.

Q You do not know?

Did Agent Medows report that to you?

A Not to my recollection.

He didn't mention the profile as such to me.

Q Did Agent Meadows request that you not disclose the fact it was an AMTRAK official?

A To the best of my recollection, that's the wish he conveyed to me.

MR. COHEN. I have no further questions, your Honor.

I'm sorry, one further question:

You indicated in the affidavit, sir, that you received information that marijuana was in fact being transhipped.

Did you in fact receive hard information [75] that the substance was marijuana?

MR. WEINBERG. Objection.

THE COURT. What's wrong with that question?

MR. WEINBERG. A word of art.

THE COURT. I understand it.

Q Did Agent Medows ever say to you that the substance within the trunk was in fact marijuana?

A No, sir.

Q What to the best of your recollection did he tell you with respect to that trunk?

A That the shipment was suspected to contain marijuana due to the appearance of the trunk.

Q And it was also related to the fact that talcum powder was leaking from it?

A That's correct.

MR. COHEN. I have no further questions.

[76] MR. WEINBERG: Would you ask Mr. Walsh to come in please?

ROBERT WALSH, Sworn

DIRECT EXAMINATION

BY MR. WEINBERG

Q Would you state your name, please?
A Robert Walsh.
Q What is your occupation?
A Police officer, Penn. Central Railroad.
Q What was your occupation in May of 1973?
A Police officer, Penn. Central Railroad.
Q What was your first contact with the events which subseqeuntly led to the arrests of three individuals in and around South Station on May 10th, 1973?
A When I reported for my usual tour at 4:00 p.m., I was advised by the day supervisor that our office had been contacted by Federal authorities in regard to a possible shipment coming from the west coast.
Q When you reported for duty on May 10th?
A On May 10th.
Q What actions did you take between 4:00 and 7:00 p.m. on May 10th?
A Our first action was: We met with the Federal officers in the JFK Building at approximately 6:30.
Q Did you ever call New Haven that day?
A Yes, I did.
[77] Q What did you learn?
A Which call?
Q How many calls did you make to New Haven?
A Our radio desk is at New Haven. We call every two hours.
Q Did you ever instruct New Haven to check that AMTRAK train and find out whether an old brown trunk was on it?
A The AMTRAK train was instructed to be checked by one of our officers at New Haven.

The instructions didn't come from myself; it came from a tour commander.
Q Did you receive the results of that inspection?
A Yes, I did.
Q What time did you receive them?
A I would say approximately 7:30. 6:45-7:30—somewhere in that time zone.
Q What were the results of the inspection?
A That the trunk that we were interested in, bearing a particular luggage tag, was on hand in the baggage car.
Q On these trains the baggage car is a segregated car from the passenger cars, sir?
A Most of the baggage cars are what we call combination cars. They are half passenger car—usually a [78] coach—and the other half is a baggage car, and it's a restricted movement car, which means it has to be either head out on the head end with the baggage section nearest the engineer or on the hind end, with the baggage section trailing.
Q Do you recall or have any knowledge as to what sort of baggage compartment was present on the train which subsequently—
A Train 86 had a combination car on the head end.
Q What sort of separation is there between the baggage and the passengers?
A There is a regular pedestrian access door, the same as the type that is on the end of each car. Usually kept locked. You don't have access though.
Q No access by passengers?
A No.
Q That train which leaves from San Diego makes numerous stops between San Diego and Boston, does it not?
A I presume so, yes.
Q And it makes a stop in New York City?
A Yes, it does.
Q And that stop precedes its stop in New Haven by several hours?
A I would say approximately two hours if it's running [79] on time.

Q Then the stop at New Haven precedes the termination of the train in Boston by three or four hours?

A That is correct.

Q And it's fair to say that that train did stop in New York and in New Haven on May 10th, 1973?

A Yes.

Q And the train's stop in New York was for some period of time?

A They're usually in New York for 10 to 15 minutes, depending on whether they are making a connection with another train.

Q And in New Haven how long was the stop for?

A 10 to 11 minutes in New Haven to change the power from electric to diesel.

Q Okay. You participated in the arrests of the three individuals that evening, did you not?

A Yes.

Q You told them that they were arrested for possessing marijuana with intent to sell?

A I don't think I myself stated what the charge was at the time they were placed under arrest.

Q Who stated it, do you recall?

A I really do not.

Q Do you recall the charge being stated?

[80] A Yes. I'm sure it was stated at the scene, yes.

Q Do you recall the word "marijuana" being used on the scene?

A I cannot say definitely one way or another.

Q See if I can refresh your recollection.

Page 11, Mr. Cohen.

Do you recall testifying before Magistrate Davis on the 9th floor here in this courthouse back in January of 1974?

A Yes, I do.

Q And do you recall being asked certain qpestions pertinent to the matters we are discussing today?

A Yes, I do.

Q Would you please read Page 11 from the second question until the fifth question down, seeing if that refreshes your recollection? Read it to yourself, if you would.

Do you recall hearing either yourself or some officer telling Mr. Chadwick and the other defendants outside the car at the time of their arrest that they were being arrested for marijuana?

A I don't recall whether it was outside the car or immediately after they were placed in the government vehicle.

Q But it was prior to their arrival at the JFK Building?

[81] A Yes.

Q The word "marijuana" was used to the best of your recollection?

A To the best of my recollection.

Q Now, you advised Mr. Chadwick and Mr. Machado in the vehicle of their constitutional rights, right?

A Yes, I did.

Q Tell us from that point everything you recall of the conversation between Mr. Chadwick and Agent Christopher or yourself or Mr. Machado in the vehicle during the ride from South Station to the JFK Building.

A They were placed in the rear seat of the vehicle. Agent Christopher was driving.

I was in the front seat.

It was dark by that time. Agent Christopher turned on the interior light of the vehicle.

I turned around and faced the two gentlemen in the back seat, advised them that I was going to read them their Miranda Warning as provided, took my Miranda Card and read it to them.

When I finished, Agent Christopher asked each one of them point by point if they understood [82] each one of their individual rights, and Agent Christopher asked them their names and addresses.

And Mr. Chadwick stated he had come from Salem, and Agent Christopher said, "You came all the way down from Salem?"

He says, "Yes"—to the effect, "Yes, to pick up a friend."

And then there was a statement made by Mr. Chadwick to Agent Christopher: "How did you know what was in the trunk?"

Agent Christopher said to the effect: We ask the questions. How do you know what is in the trunk? at which time Mr. Chadwick said, "You are twisting around what I'm saying. I don't want to talk to you anymore."

That was the end of the discussion until we got to the Federal Building.

Q When Mr. Christopher asked them whether they understood their rights, did he go over each right specifically?

A Yes, point by point, for the four or five points.

Q Just in conclusion: This train has a schedule, right?

A Yes.

Q And that schedule is printed and available to the public?

[83] A Yes.

MR. WEINBERG: And I have no further questions. Thank you.

MR. COHEN: No questions.

THE COURT: You are excused.

MR. WEINBERG: That concludes the evidence, your Honor.

MR. COHEN: We stipulate that there was no warrant.

MR. WEINBERG: There was no search or arrest warrant.

THE COURT: Do you want to argue now or do you want to give me your briefs and then argue it later or what? You said you wanted some time.

MR. WEINBERG: Yes. I'd like 14 days after the preparation of the transcript for a short addditional memorandum.

My basic memorandum is already in, so I don't think there is any point for a reply brief unless you do.

MR. COHEN: I just think there might be a proml em by the time you—that's fine with me.

THE COURT: Okay.

MR. WEINBERG: Whatever is best for your [84] Honor.

MR. COHEN: I'd like a chance to argue. I think it would be appropriate to have briefs before the Court before you argue it.

THE COURT: Seems to make sense. If you're going to have your memos and if you're going to go to the trouble of having a transcript, seems to me it might be helpful for me to have all that, and then I can be prepared to ask you any questions that I might have at the time of argument.

So let's have your briefs 14 days after you receive the transcript.

Mr. Curry will let Mr. Doherty know when the transcript is given to you, and upon receive of your brief, then we will be alerted to set the matter down for a hearing at some future point.

Now nobody is incarcerated here?

MR. COHEN: No.

THE COURT: What about the 180 days?

MR. COHEN: We are past it. They filed a Rule 50 (b) waiver. Mr. Weinberg's client has. I'm not too sure about the other defendants. You ordered that the other defendants actually file waivers in court. Whether that was filed, I have no knowledge.

[85] I have a letter sent by Mr. Doherty to all counsel stating that they were before Judge Kellam and they waived the Rule 50(b), but this court wanted written waivers. I simply don't know if they filed those or not.

MR. WEINBERG: Mr. Chadwick has executed and is prepared in open court today to waive his speedy trial rights again as of this date.

THE COURT: When was the arraignment?

MR. WEINBERG: November 14.

MR. COHEN: November 14 of 1973.

MR. WEINBERG: There was a whole series of complications. The motion to suppress was heard in front of the Magistrate—things like that.

THE COURT: Oh is this the case that—

THE CLERK: Transferred it to Judge Kellam for trial.

MR. WEINBERG: At that point Miss Leary's counsel, Mr. McColough was ill, and Mr. Barber, who is replacing him, had just been retained that day, and he requested a continuance, which I consented to, and the case was then rescheduled for the hearing today.

THE COURT: Who are the lawyers in this case now?

[86] THE CLERK: Mr. Phillip Nyman of Lowell and Mr. McColough from North Billerica and Mr. Weinberg.

MR. WEINBERG: Both of the counsel at that point waived a speedy trial as of that date. Mr. Doherty asked for execution by formal waivers. I don't know, other than Mr. Chadwick, replied.

THE COURT: Are you going to contact those lawyers? Are you in contact with them at all?

MR. WEINBERG: No, not with either of them, your Honor, with the exception of sending them copies of motions and things.

THE COURT: Why don't you call them and tell them I want to know why they haven't. Based on their response to you, I will decide what else I will do them, if anything, for not having replied. Taking two months to reply.

Okay. We will look for your briefs then.

[Whereupon, the hearing was adjourned.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 73-239-T

UNITED STATES OF AMERICA

v.

GREGG JOHN MACHADO
BRIDGET ANN LEARY
JOSEPH A. CHADWICK

NOTICE OF APPEAL

Notice is hereby given that the United States of America, pursuant to Title 18, United States Code § 3731, hereby appeals to the United States Court of Appeals for the First Circuit from the Order of the United States District Court for the District of Massachusetts dated January 13, 1975 granting defendants' Motion to Suppress.

It is hereby certified that the appeal is not taken for purposes of delay and that the evidence suppressed by the Order of the Court is a substantial proof of a fact material in the proceeding.

/s/ James N. Gabriel
JAMES N. GABRIEL
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 73-239-T

UNITED STATES OF AMERICA

v.

GREGG JOHN MACHADO
BRIDGET ANN LEARY
JOSEPH A. CHADWICK

MOTION TO VACATE ORDER
AND FOR RECONSIDERATION

Now comes the United States of America, by and through its attorneys, and moves this Honorable Court to vacate the Order dated January 13, 1975, granting a Motion to Suppress, and to reconsider the matter for the following reasons:

1. To the extent that this Court ruled that the warrantless opening of the footlocker was improper, this Court stated, in part, that it was clear that had Machado and Leary been arrested in South Station, instead of at the vehicle, a warrant wou'd have been required (Opinion and Order, p. 18). From this premise, this Court concluded that the placing of the footlocker into the vehicle did not make the search any more valid (Opinion and Order, p. 1819). In the government's view, however, the initial premise—i.e., that a warrant would have been required had the arrest occurred in South Station—is erroneous, since the search would have been proper as incidental to the arrest. See *Draper* v. *United States*, 358 U.S. 307 (1959); *Machiz* v. *United States*, 437 F.2d 145, 147 (9th Cir. 1971), certiorari denied, 402 U.S. 974 (1971); *United States* v. *Maynard*, 439 F.2d 1086 (9th Cir. 1971); *United States* v. *Buchanon*, —— F.2d ——, No. 74-1213 (8th Cir. November 13, 1974); *United States* v. *Lugo-Daez*, 412 F.2d 435, 437-439 (8th Cir. 1969), certiorari denied, 397 U.S. 966 (1970). The fact that the actual search took place at the DEA office would not invalidate the "incidental to arrest" exception. *United States* v. *Edwards*, 415 U.S. 800, 802-809 (1974); *Abel* v. *United States*, 362 U.S. 217, 239 (1960); *United States* v. *DeLeo*, 422 F.2d 487, 491-493 (1st Cir. 1970).

2. To the extent that this Court ruled that the contents of two suitcases were suppressible, it should be pointed out that at no time did defendant Chadwick claim any interest in those suitcases. The hearing on Chadwick's Motion to Suppress concentrated on the footlocker, as did Chadwick's Memorandum of Law.[1] Although defendant Leary—who had an interest in the suitcases—did later join defendant Chadwick's Motion to Suppress, defendant Leary relied upon Chadwick's motion and argument, and did not focus on the suitcases.

Had the issue been properly raised at the hearing on the motion to suppress, the government would have presented evidence showing that the opening of the suitcase was affected—not as a search for more incriminating evidence—but simply to inventory the contents of the suitcase according to established DEA procedure. In these circumstances, the inventory was clearly proper. See *California* v. *Cooper*, 386 U.S. 58 (1967); cf. *Harris* v. *United States*, 390 U.S. 234 (1968).

3. To the extent that this Court suppressed defendant Chadwick's statement, in the government's view, this Court improperly concluded that an illegal arrest neces-

[1] Preliminarily to the taking of evidence at the hearing on the Motion to Suppress, counsel for Chadwick stated (Tr. 3):

> Briefly, in the matter of an introduction, I am moving to suppress four different items, your Honor. The first is approximately 200 pounds of a substance which is identified as marijuana, which was found in a trunk seized from a rented vehicle which was connected with Mr. Chadwick.
>
> Second, is a very minute amount of marijuana seized from Mr. Chadwick's body pursuant to his arrest.
>
> Third, is the trunk itself and/or any other containers within which this alleged marijuana was contained.
>
> Fourth, is any statements made by Mr. Chadwick subsequent to his arrest, since I understand it was done prior to his arrest.

sarily requires suppression of a statement which follows that arrest. The admissibility of a statement turns, not on whether or not there was an illegal arrest, but whether the statement was voluntary. *Rogers* v. *United States*, 330 F.2d 535, 542 (5th Cir. 1964), certiorari denied, 379 U.S. 916 (1964). As stated by Chief Judge Caffrey (*United States* v. *Burke*, 215 F. Supp. 508, 511 (D. Mass. 1963)):

> I do not read the recent decision in *Wong Sun* v. *United States*, 371 U.S. 471, 83 S. Ct. 407, 409, 9 L.Ed.2d 441 (1963), or any other opinion of the Supreme Court, as ruling that as a matter of law a person who is illegally arrested is thereby rendered legally incapable of making any voluntary admission or any voluntary surrender of property on his person by reason of the illegal arrest. I believe that whether or not an admission or a surrender of property made after an illegal arrest is voluntary and therefore admissible in evidence, or involuntary and therefore inadmissible, is to be decided on a motion to suppress as a question of fact, (*United States* v. *DeVivo*, 190 F. Supp. 483, 486 (D.D.N.Y. 1961)), in the resolution of which the trier of fact should have in mind the "oppressive circumstances" (*Wong Sun* v. *United States*, supra, at 486, n. 12 of 371 U.S., at 417 of 83 S.Ct.) surrounding the illegal arrest and should require clear and convincing evidence that the admission or surrender is the product of an intervening independent act of the defendant's free will.
>
> I find as a fact that Leo Burke was fully advised of his rights by the Post Office Inspectors and that his conviction with them and the swap of the two $20 bills made by him subsequent to the illegal arrest was made deliberately and voluntarily on the basis of an intervening independent act of his own free will, and that they were not made under the compulsion of the illegal arrest.

In the present case, the evidence clearly showed that Chadwick was fully advised on his *Miranda* rights. There is no evidence that Chadwick experienced any compulsion, or that his statement was other than of his own free will. Therefore, his statement should not be suppressed because of the illegal arrest.

Respectfully submitted,

JAMES N. GABRIEL
United States Attorney

By

LAWRENCE P. COHEN
Assistant U.S. Attorney

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. Misc. 75-8015

UNITED STATES OF AMERICA, APPELLANT,

v.

JOSEPH A. CHADWICK,
BRIDGET A. LEARY,
GREGG J. MACHADO,
DEFENDANTS, APPELLEES.

ORDER OF THE COURT

Entered February 25, 1975

Upon motion of appellant,

While retaining the appellate jurisdiction of this court, leave is granted the district court to entertain and act upon the Government's motion for Reconsideration, with the district court to report promptly to this court the decision thereon; and

It is ordered further prosecution of this appeal be stayed pending the district court action on said motion.

By the Court:

/s/ Dana R. Gallup
Clerk

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CR 73-239-T TAURO, DJ.

UNITED STATES OF AMERICA

v.

GREG J. MACHADO
BRIDGET A. LEARY
JOSEPH CHADWICK

MOTION FOR RECONSIDERATION OF
MOTION TO SUPPRESS

* * * *

[2] THE COURT: Okay, go ahead, Mr. Cohen.

MR. COHEN: This matter is here on the government's motion for reconsideration. Instead of taking them in the order presented in my motion, I would first like to go to the second point concerning the suitcases, your Honor.

This Court in his opinion considered the suitcases and footlocker on an equal footing.

THE COURT: Because I was led to believe I should.

MR. COHEN: I don't think I led you to believe, your Honor, as I understood Mr. Weinberg, the thrust of his opening remarks at the hearing on the motion to suppress, we all concentrated on the footlocker. I am not saying—I think maybe we were all led into that belief because Mr. Weinberg's client had no association with those suitcases and counsel for the other two defendants did not show up at the hearing. But on that issue, your Honor, I would like to call Agent Christopher for two minutes' testimony concerning those suitcases. I will not be repetitive or anything testified to before.

I did not question him concerning the suitcases themselves because at the time we were first here, I didn't think it was an issue raised by [3] Mr. Weinberg.

THE COURT: Okay.

RICHARD G. CHRISTOPHER, Sworn

DIRECT EXAMINATION

BY MR. COHEN

Q Will you state your full name, sir?
A Richard G. Christopher.
Q And your occupation?
A Special Agent with the Drug Enforcement Agency.
Q And your occupation, sir, in June 1973?
A I was a Special Agent with the Bureau of Customs assigned to the office for drug abuse law enforcement.
Q Now, Agent Christopher, to refresh your recollection, do you recall testifying on September 5, 1974, concerning the arrest of the defendant in the case, the seizure and search of a particular footlocker?
A Yes, sir, I do.
Q Now, sir, as I recall your previous testimony in this case, you indicated that you saw a porter remove the footlocker in question from the AMTRACK train, is that correct, or you saw the porter coming with the footlocker?
A That's correct, sir.
THE COURT: Coming where, coming out of the [4] train station, that's as I recall the testimony.
Q When did you first see the footlocker?
A I saw the footlocker when it was removed from the baggage car of the train on which it arrived, and I watched it from that point to the point where it reached the vehicle being operated by Mr. Chadwick.
Q Now, sir, at that time do you recall seeing any suitcases?
A Yes, sir, I do.
Q And do you recall the description of those suitcases?
A Yes, sir.
Q What were they?

A One was a medium-sized red tourister suitcase; the other was the same type suitcase in a tan or brown color.
Q Where did you first see the red suitcase?
A I believe the red suitcase was being carried by Bridget Leary or a girl whom I knew to be Bridget Leary when she left the train.
Q And the other suitcase, the tan suitcase?
A I became aware of that inside the station when they left the terminal.
Q Now, sir, you also testified at the previous hearing that you requested a dog handler to send the detector dog down toward the footlocker, is that [5] correct?
A That's correct, sir.
Q Did you instruct the dog handler to have the dog check the suitcases?
A No, sir, I didn't.
Q And you had received earlier information from San Diego, had you not, concerning the footlocker?
A Yes, sir.
Q Had you received any information concerning the suitcases?
A No, sir.
Q And after, sir, you placed the defendants under arrest, where were the suitcases as opposed to the footlocker?
A At least one of the suitcases was in the passenger compartment of the motor vehicle as opposed to the trunk. I don't recall whether both were in there or not.
Q And at the time you made that arrest, sir, did you have any reason to believe that the suitcases contained marijuana?
A No, sir.
Q And did you seize the vehicle in which the suitcases were placed?
A Yes, sir.
[6] Q For what purpose?
A Did you say seize?
Q Seize the vehicle?

A Because it was being used to facilitate the transportation of marijuana.

Q And was it seized for the purpose or possible purpose of forfeiture to the United States?

A Yes, sir.

Q Now, sir, then you arrived back at your office approximately nine o'clock, is that correct?

A Yes, sir.

Q At some time were the two suitcases searched?

A Yes, sir.

Q By whom were the suitcases searched?

A By Special Agent Lambert and possibly Trooper Aiello in my presence.

Q And for what reason were those suitcases searched?

A To inventory the contents for accountability purposes, mostly to make sure there was nothing lost or anything of value in there that it could be recorded and accounted for at a later time.

Q Are you familiar, sir, with the regulations concerning the seizure of property, particularly personal effects of a person asserted?

A Yes, sir, I am.

[7] Q What are those regulations?

MR. WEINBERG: Objection.

THE COURT: Do you have the regulations?

Whose regulations?

MR. COHEN: Drug Enforcement Agency.

THE COURT: You mean what is the standard procedure?

You understand I would be interested in it, but we all know their procedures might well be the constitutional standards or otherwise.

MR. COHEN: That's correct.

THE COURT: I don't know it is particularly relevant, but I am more interested: Which suitcase was in the car? You said one suitcase was in the passenger compartment of the car.

THE WITNESS: I said I know at least one was, your Honor. I just don't recall whether both of them were in the passenger compartment.

THE COURT: You know one was?

THE WITNESS: Yes.

THE COURT: Which one?

THE WITNESS: I don't recall at this time.

THE COURT: And were the suitcases locked?

THE WITNESS: Yes, sir, they were.

THE COURT: Where did you get the key?

[8] THE WITNESS: There were no keys, no one had a key, your Honor, none of the three defendants had keys to those suitcases.

THE COURT: So how did you get them opened?

THE WITNESS: They were broken open, sir.

THE COURT: Go ahead.

Q What is the regulation concerning property?

THE COURT: Do you have a copy of the regulation?

MR. COHEN: I have several regulations, your Honor, but I want to know what the agent's understanding of these regulations is concerning day-to-day business of the Drug Enforcement Agency.

THE COURT: I am not so sure that's going to help me too much, what his understanding is.

I would be interested in knowing what the regulations are, and I don't mean any disrespect to the agent, but you certainly can't rely on his understanding of what his responsibilities were.

MR. COHEN: But I think I can rely upon his interpretation of a broad regulation, what to do with personal effects.

THE COURT: Shouldn't you start with the regulations, then?

MR. COHEN: May I have a minute to show it [9] to counsel?

THE COURT: I would be interested in the regulation that talks about what you do with locked suitcases.

MR. COHEN: By agreement of counsel, may I read the relevant portion?

THE COURT: Please.

MR. COHEN: The first is Section 6662.25.

THE COURT: You are going to give me a photostat of that after?

MR. COHEN: Yes, outlining the paragraphs we are dealing with:

> "Collection and handling of other personal property."

Subparagraph A-2 reads as follows:

> "Personal property of non-evidentiary value which is found in a seized automobile will be handled as outlined in 6654.23, Seizure Procedures."

Section 66654.23 of the agent's manual reads in pertinent part as follows:

> "Upon seizing the vehicle, it must be thoroughly searched. A search performed pursuant to civil seizure need not be contemporaneous with an arrest, and no [10] search warrant is necessary. Remove all articles from the vehicle which are not part of the vehicle itself.
>
> "Personal property in the vehicle should be returned to the owner or the person from whom the vehicle was seized, and a receipt obtained. This should be done at the time of seizure or as soon thereafter as possible."

That's the relevant portion, your Honor.

I will send a photocopy of this to the Court.

THE COURT: It says the property should be returned.

MR. COHEN: Upon receipt, the party to whom the property is returned must execute a receipt.

THE COURT: Go ahead.

Q Sir, at the time those suitcases were searched, were you familiar with these regulations?

A Yes, sir, I was.

Q And interpreting and applying them on a day-to-day basis, sir, were all personal searches to determine what was the contents of that personal property?

A Yes, sir.

Q And did you do so on this occasion with respect to [11] the suitcases?

A Yes, sir.

Q And at the time, sir, did you have any reason to believe that marijuana was contained in either suitcase?

A No, sir.

MR. COHEN: I have no further questions, your Honor.

CROSS EXAMINATION

BY MR. WEINBERG

Q You saw both these suitcases prior to their being in the car, is that correct?

A Yes, sir.

Q And once again the situation with the car was the same regarding the suitcases as it was with the footlocker we discussed some months ago, meaning where it was, it was seized at the same time, is that correct?

A That's correct, sir, yes.

Q Just to re-incorporate everything else that's gone on before rather than recross—

THE COURT: You stipulate the operative facts are the same?

MR. COHEN: I will stipulate.

THE COURT: As far as people present and [12] the circumstances as far as exigencies and all the rest of it, is that agreed?

MR. COHEN: Yes.

MR. WEINBERG: One last question.

Q Did you give a receipt to the owners of the suitcases?

A No, sir.

Q What else was in the suitcases but marijuana?

A There were articles of female clothing, undercloth-ing, and I particularly recall a leopard skin type outer garment, two champagne glasses, and then the bricks of marijuana.

I don't know which of the two suitcases contained how much of each. But that was generally the contents, personal effects and marijuana.

Q I will ask you the question I am not supposed to ask you: Why didn't you give the receipts to the possessors of the suitcases?

A For the merchandise that was in the suitcases?

Q Yes, for the leopard skin coat?
A They didn't claim ownership.
I asked, you know, who owns the suitcase so I could determine who had the key, and no one came up with the answer.
Q And you asked that prior to inventorying the suitcases?
A Prior to entering the suitcases.
[13] Q For the purpose of inventory regulations so people who claim ownership know what's in them, is that correct, so you are protected against allegations you have stolen something?
A Please repeat the question.
Q The reason why you go through suitcases is that so someone can't accuse you of stealing things, is that why you go through?
A That must be one aspect of it.
Q Is that the reason why in this case you went through them?
A Yes, certainly.
Q So no one could accuse you of stealing anything, right?
A Yes.
Q Yet they were locked, is that right?
A Yes.
Q And you had to break through them to get into them?
A That's correct.
Q And there was no other way to open them manually except breaking through?
A When I say breaking, they were entered without the key. The locks might have been picked, but they were entered without any assistance from the defendants.
MR. WEINBERG: I have no further questions.
[14] THE COURT: Agent, you talked about your responsibility to preserve the property that's found in the seized vehicle.
THE WITNESS: Yes, sir.
THE COURT: If a vehicle is seized and it has two locked suitcases in it, isn't it sufficient for you to just

inventory the fact that you have got two locked suitcases and keep them secure?
THE WITNESS: It would be sufficient if we knew the contents, your Honor. I have been, so to speak, raised on the belief you ought to see what you are accounting for.
THE COURT: All you are accounting for is two suitcases, locked.
THE WITNESS: Two suitcases that have a basic weight to them other than that what apparently would be a weight of the suitcases and the contents may be perishable, explosive, or may just simply be underclothing or whatever might be the contents.
THE COURT: That wasn't your reason for opening them. You didn't have any suspicion about explosives?
THE WITNESS: Oh, no, none at all. We merely wanted to determine whether there was anything of value in there and whether that merchandise should [15] be handled as though it were a monetary negotiable instrument or placed in a security situation appropriate with the value of the merchandise or the object itself.
THE COURT: When you have a locked suitcase, don't you have the facilities to secure that suitcase and don't you have a room or some facility for locking it up so you don't have to worry about somebody stealing the contents?
THE WITNESS: Yes, sir, but we have qualifications as to what type material goes into high security vaults and materials that don't go into that.
For example, heroin, although it is not related to this, definitely goes into a security vault like a bank vault; and simply personal clothing would go into, perhaps, a caged area that's just merely locked with a padlock.
THE COURT: This is all within the office of the DEA?
THE WITNESS: Yes, sir.
THE COURT: Have you ever had any break-ins?
THE WITNESS: I am sorry, in this instance—
THE COURT: Have you ever had—
THE WITNESS: —this was stored at [16] Appraisers Storage Building.

THE COURT: Why?

THE WITNESS: The Customs Building at 407 Atlantic Ave. on the corner of Northern, Altantic Aves. We didn't operate under auspices with the facilities of the Bureau of Narcotics and Dangerous Drugs except with regulation to drug evidence itself as under the office of the DEA enforcement.

THE COURT: Were these suitcases opened up at a time different from the trunk, the footlocker?

THE WITNESS: A short time, your Honor, within a half hour period, I would say, if it was that long.

THE COURT: Then before or after the footlocker?

THE WITNESS: After the footlocker.

THE COURT: After you opened the footlocker, did you have some reason to think that there might be some additional marijuana?

THE WITNESS: No, sir, your Honor.

As a matter of fact, when we opened the first suitcase and found there was marijuana there, we didn't even suspect marijuana in the second suitcase. That was the surprise in both instances.

THE COURT: Did you know at the time you [17] opened either of the first two suitcases—are you the one that opened them?

THE WITNESS: No.

Agent Lambert, the agent in charge. I was there at the time.

THE COURT: It is hard for me to say this, but subject to there being an objection, did you know at the time you saw Agent Lambert open the suitcase, did you know that marijuana had been found in the trunk?

THE WITNESS: Yes, sir, I did.

MR. COHEN: I would stipulate so did Agent Lambert and Agent Lambert participated in the opening of the footlocker as well.

THE WITNESS: That's correct.

THE COURT: Any other questions?

MR. COHEN: I just want to reiterate one thing:

Q (By Mr. Cohen) This was done at each and every occasion, is that correct?

A Yes, sir.

Q That personal effects are taken along with the arrested person?

A Yes, sir.

[18] RECROSS EXAMINATION

BY MR. WEINBERG

Q There has never been a time in your entire experience where there was some kind of bolted, locked suitcase you kept away for ten minutes where a guy was getting bailed out?

A That we haven't opened it, sir?

Q Yes, that you didn't break through a bolt?

A I can only say that this was unusual that there were no keys available. It would have been opened for the security of the merchandise.

THE COURT: Well, that's not what he asked you.

THE WITNESS: I'm sorry.

THE COURT: That's not what he asked you.

He asked you whether or not given a situation where the suitcase was locked, have you ever had a situation with a locked suitcase before that you didn't break it open, that you merely returned it to the individual?

THE WITNESS: I can't say that I have, your Honor.

I don't know of a time when we have taken a person into custody that was carrying luggage that it was not examined and a list of the contents determined, because we can anticipate such person might [19] get bail but we can't be sure he will. And it would mean we would have to wait an hour to get bail and then have to go through the same routine anyway, and usually it is done as quickly as possible.

THE COURT: Does this apply whether it is locked or unlocked?

THE WITNESS: Yes, sir.

THE COURT: Even if it is locked and he has the key?

THE WITNESS: If he has the key we would unlock it as opposed to breaking in, if that's your question?

THE COURT: Suppose he doesn't want to give it to you, the key?

THE WITNESS: The key?

Well, we would take all of his personal possessions including his belt and shoelaces from him when he is in custody, and among those would be his key, his wallet, papers and so on.

THE COURT: And you feel you are entitled to look through everything just on the basis of making an inventory?

THE WITNESS: No, sir, only on this particular situation because the merchandise being in the car and the people we know are going to go into [20] jail, because they were not able to get bail, and that the agents' and agency's integrity could be subjected to question if we did not know what we had and were able to account for it.

Q (By Mr. Weinberg) Is that the same thing with a briefcase, a guy arrested carrying a briefcase, locked briefcase, you open it up or break into it in order to inventory the papers?

A You are giving me a situation here now which I haven't got to evaluate.

I don't know what the purpose is.

If I have information on a man's briefcase and he has drugs in the briefcase, I will have to guide myself accordingly to the situation as it exists. A man's briefcase is a man't briefcase, and I wouldn't go into his briefcase itself, that's simple.

THE WITNESS: That's all.

REDIRECT EXAMINATION

BY MR. COHEN

Q I think the question is: If he were arrested and taken into custody?

THE COURT: You understand I think this is proper examination because you opened it up by asking him what the regulations, the interpretation of the regulations?

[21] MR. COHEN: That's correct.

THE COURT: Normally I would think this is speculative examination, but since you did set the parameters of this examination, I think it is proper for counsel to go into it.

MR. COHEN: All right.

Q (By Mr. Cohen) If the person with the briefcase were placed under arrest by you for one reason or another, were taken to the DEA or Customs, would you have inventoried his briefcase at the time you arrived?

A Absolutely. I'm sorry, I didn't realize you had an arrest situation. If he was in custody, what he has with him would be inventoried.

Q And you give him a list, let's say he has a briefcase, 180 pages of various documents?

THE COURT: You give him a receipt for each and every document listed?

THE WITNESS: No.

We will give him receipts for miscellaneous papers, just as we would give a receipt for various personal effects, one accounts for clothing.

Q Just a receipt for personal effects?

A Yes.

Q Just like a receipt for a suitcase?

A Well, that would be the same type of receipt.

[22] Q But you would give him a receipt but would you outline every pair of underwear in the suitcase, is that correct?

A No.

Unless the merchandise were returned to them, when we return it, there would be an itemized list of what they received.

Q A guy is carrying a suitcase.

THE COURT: Excuse me, how would you know what to carry on that if you don't itemize it when you open it up?

You know what you returned, but how would you be able to protect yourself because you wouldn't have had a list of the things that were in the suitcase the moment that you opened it up.

THE WITNESS: Normally in this situation, your Honor, if I open a suitcase up and see four bricks of

marijuana, numerous articles of women's clothing, two glasses, it doesn't require—it is something I can remember on the instant and I would make it up.

I wou'd list the things on a piece of paper. Then when the time came to return this, by the time it was returned, it would be typed up. There would be a list in any instance of the [23] merchandise that was returned at the time it is returned.

THE COURT: Okay.

DIRECT EXAMINATION

BY MR. COHEN

Q If it were clothing, how would you list the miscellaneous clothing?

A Personal effects.

Q If you found a diamond ring?

A We would describe the color of the ring, white or colored metal, the setting with a diamond-appearing stone as oppposed to a diamond.

Q And this you would do at the initial inventory?

A Yes.

MR. WEINBERG: No questions.

THE COURT: Okay, thank you very much.

Anything else?

MR. COHEN: No, your Honor, no more evidence.

SUPREME COURT OF THE UNITED STATES

No. 75-1721

UNITED STATES, PETITIONER,

v.

JOSEPH A. CHADWICK, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 4, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1721.

UNITED STATES OF AMERICA,
PETITIONER,

v.

JOSEPH A. CHADWICK ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents in Opposition.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents in Opposition.

Questions Presented.

Whether this Court should grant certiorari on an issue which was never squarely presented by the parties or directly ruled upon by the courts below, and which is framed in the context of a confused and fragmented record?

Whether the warrant requirement should be abolished for federal searches of luggage believed to contain contraband when the search-incident exception does not apply and no exigent circumstances compel swift police action?

Statement of the Case.

Prior Proceedings.

Defendants-respondents Chadwick, Machado and Leary were arrested on May 10, 1973, and were subsequently charged on November 2, 1973, with possession of marijuana with intent to distribute and conspiracy in violation of 21 U.S.C. §§ 841(a)(1) and 846. Prior to trial, respondents challenged the validity of Chadwick's arrest as lacking in probable cause and moved to suppress the fruits of a warrantless search of certain luggage (a large footlocker and two small suitcases), a body search of Chadwick's person and certain remarks made by Chadwick in the immediate aftermath of his arrest.

After an evidentiary hearing held on September 5, 1974, the district court made extensive findings of fact favorable to respondents on all issues and suppressed all of the challenged evidence (Pet. App. 32a-51a). The government then moved for reconsideration, and a second evidentiary hearing was held on March 6, 1975. The result of the reconsideration was that the district court amplified its previous rulings and reaffirmed its decision to suppress (*Id.*, 52a-63a). The government appealed and on March 29, 1976, the court of appeals rendered a decision upholding all the determinations of the district court on all issues[1] (Pet. App. 1a-31a).

[1] The specific bases for the decisions of both courts below to suppress the evidence seized from the warrantless search of the footlocker and of the two suitcases are discussed below at pp. 6-8. As to Chadwick personally, the court of appeals affirmed the district court's finding that there was "insufficient cause to justify Chadwick's arrest" and therefore "his subsequent statements and all evidence seized during the post-arrest search of his person [must be] suppressed" (Pet. App. 43a-44a; see *id.*, 26a-27a).

The government now seeks review on certiorari, not of that entire decision, but of one issue only. Passing over the rulings of both courts below that Chadwick's arrest was illegal, that his statements and any evidence seized from his person must be suppressed and that the warrantless search of the two small suitcases was invalid, the government splits off for challenge only the decision to suppress the evidence seized from the large footlocker. Apart from the confusion, which will be more fully detailed below, resulting from the government's decision to seek certiorari with respect to only one aspect of the luggage search and not the other, the government's decision to accept the ruling that Chadwick was illegally arrested creates confusion as to whether review of the footlocker search would be applicable to Chadwick at all.

Pertinent Findings of Fact With Respect to the Luggage Searches.

Both opinions of the district court (Pet. App. 32a-51a, 52a-63a) and the opinion of the court of appeals (*Id.*, 1a-32a) contain extensive findings of fact which fairly summarize the evidence adduced at the two hearings. The key findings pertinent to the luggage searches[2] are these:

[2] Although the government seeks certiorari only with respect to the footlocker search and not with respect to the search of the two suitcases, certain facts pertaining to the suitcases and their relationship to the footlocker are relevant to the question of whether or not the writ of certiorari should be granted, and so the facts surrounding both luggage searches will be reviewed together.

On May 8, 1973, federal agents in Boston received reliable information from the Office for Drug Abuse Law Enforcement (ODALE) in San Diego, California, that one Machado, who fit a profile used to spot drug traffickers, had shipped an old brown trunk or footlocker, weighing almost 200 pounds, as accompanied baggage on an Amtrak train to Boston. Based on Machado's profile, the fact that the footlocker was leaking talcum powder (a substance known to be used to mask the odor of marijuana) and the footlocker's "unusual weight for its size," it was suspected that the footlocker contained marijuana (Pet. App. 2a-3a, 34a).

The train was due to arrive at South Station, Boston, three days later, at 7:50 p.m. on May 10th. During those next few days, May 8, 9 and 10, the Boston agents continued investigating and readied themselves for the arrival of Machado and his traveling companion (a woman later identified as Leary).[3] ODALE determined that "the suspicion was sufficient to justify an expenditure of men and energy at South Station" and accordingly six law enforcement officers, as well as a "detector dog" trained to "alert" to marijuana and its handler, were gathered at the station an hour before the train's scheduled arrival. No advance efforts were made, however, to seek search or arrest warrants (Pet. App. 3a, 5a).

After the train's hour-late arrival, the agents identified a debarking passenger fitting Machado's description and observed him and Leary "take possession of an old brown footlocker and two suitcases" (Pet. App. 35a). Machado and Leary took the footlocker from the baggage cart which had been used to transport the 200-pound item from the train to

[3] Apart from communications confirming Machado and Leary's continued presence on the train, when the train passed through New Haven, Connecticut, several hours prior to its Boston arrival, Amtrak officials verified that the footlocker was still on board (Pet. App. 3a, 34a).

the station area, placed it on the floor and sat down upon it; "the couple also had with them [the] two suitcases" (*Id.*, 3a).[4]

Shortly thereafter, Chadwick arrived and "Machado and Leary engaged a redcap who physically transported the footlocker out to the car" which Chadwick had brought to the station (Pet. App. 4a; see *id.*, 38a). Leary, taking one of the two suitcases with her, entered the front passenger compartment of the parked automobile (*Id.*, 4a, 53a). The redcap, with the help of Machado and Chadwick, loaded the footlocker into the trunk of the car and "the other suitcase was placed in the automobile trunk with the footlocker" (Pet. App. 53a; see *id.*, 4a).

Then, "before the trunk lid was closed or the car engine started, the federal agents closed in and arrested the trio" (Pet. App. 5a). The respondents were immediately frisked, handcuffed and placed into government vehicles and the agents took possession of the automobile and the luggage. No guns or weapons were found; no accomplices were suspected or believed to be in the area; the footlocker was observed to be locked with two different locks (a padlock over the regular trunk latch); and immediately after the arrest the keys were taken from Machado's person (*Id.*, 5a, 7a, 35a-36a, 50a). As the government conceded in testimony, the luggage was, from the moment of arrest, under the agents' "control at all times" (*Id.*, 5a; see 35a-36a, 50a).

The footlocker and two suitcases were taken to the ODALE office. No efforts were made to secure a search warrant, but approximately an hour and a half later the luggage was opened — the footlocker by key, the suitcases by breaking the locks. Each piece of luggage was found to contain marijuana (Pet. App. 7a-8a, 36a, 53a).

[4] The agents confirmed their suspicions by having the detector dog go to the footlocker and observing its "alert" response; the agents did not have the dog sniff the suitcases (Pet. App. 4a, 35a).

The Government's Shifting Position with Respect to the Luggage Searches.

At each stage of this case — the hearing on the motion to suppress, the reconsideration of that motion, the appeal, and now the petition for certiorari — the government has taken entirely different positions with respect to the luggage searches. Accordingly, at each stage, the court involved has been asked by the government to answer a *different* question.

Stage 1: In its original opposition to respondents' motion to suppress, the government took a position which is wholly at variance with its stance before this Court now. First of all, it made no legal distinction between the footlocker, on the one hand, and the suitcases, on the other, and relied on *the same theory* to justify the warrantless searches of each (Pet. App. 33a, n. 1). Secondly, the theory that it relied upon was "exclusively" the "automobile exception"; it argued that because the luggage was placed in a parked automobile — the footlocker and one suitcase in the trunk, the other suitcase in the passenger compartment — before the seizure, the "automobile exception" immunized the agents from their Fourth Amendment duties (*Id.*, 9a, 46a, 51a). The district court, finding that "the automobile was nothing more than a platform or resting place for the [luggage]" (*Id.*, 48a), and that the luggage "was not in imminent or even potential danger of being destroyed or spirited away" (*Id.*, 50a), rejected the government's proffered excuse for its neglect to obtain a warrant[5] (*Id.*, 48a-49a). The district court also examined the facts to determine whether any exigent circumstances were present to justify application of the automobile

[5] Although the automobile exception was not pressed by the government on appeal, the court of appeals did review — and affirmed — the district court's ruling on this issue (Pet. App. 9a-10a).

or any other exception; it concluded that no such exigency existed and that none of the other exceptions to the warrant requirement were applicable (*Id.*, 50a-51a).

Stage 2: In response to its defeat, the government petitioned the district court for reconsideration on an entirely new set of theories. It separated the question of the suitcases from that of the footlocker and argued that, as to the footlocker, the search was justified as one incident to arrest (*Id.*, 10a, 54a), while, as to the suitcases, the "breaking open" was not really a "search" at all but was done merely to "inventory" their contents (*Id.*, 20a, 57a). The court rejected both theories: the footlocker, it found, "as a matter of fact, practicality and law . . . was simply not within the control of the defendants at the time of arrest" (*Id.*, 56a) and the "breaking into the suitcases" could not be justified as a routine "inventory search" (*Id.*, 58a-59a).[6]

Stage 3: On appeal the government switched again with respect to the footlocker. It argued that the search incident exception, as articulated in *Chimel*, did not apply to this case; rather, because the arrest occurred outside of a dwelling, the legality of this particular warrantless "search incident" should be tested by a standard of "reasonableness" (Pet. App. 11a-12a).[7] The court of appeals, noting that the *Chimel*

[6] Doubtless because of the physical proximity of the suitcases and the footlocker at the time of arrest, the district court also made an additional finding that the "search-incident exception" could not save the suitcase searches; the court found that, as with the footlocker, "there was no showing that, at the time of arrest, the suitcases were within the immediate possession or control of any of the defendants" (Pet. App. 57a-58a). This finding was specifically affirmed by the court of appeals (*Id.*, 20a).

[7] The government also argued alternatively that, in any event, the footlocker was within defendants' control at the time of arrest under *Chimel* v. *California*, 395 U.S. 752 (1969)) (Pet. App. 11a).

formulation, like the Fourth Amendment itself, is not limited by rationale or precedent to arrests occurring inside houses, held the *Chimel* test to be eminently relevant (*Id.*, 12a) and held further that "applying *Chimel*, we find no error in the lower court's decision that the footlocker was not in an area within the arrestee's immediate control" (*Id.*, 13a, see 15a).

After disposing of the footlocker issue by this holding, the court of appeals noted: "While . . . we understand the government to be relying on the search-incident-to-arrest exception, part of its argument *suggests* that it may also be looking in the direction of liberalized luggage search rules . . . " (emphasis added) (Pet. App. 16a). The court of appeals then went on to discuss, in *dictum* its view that baggage does not constitute a category exempt from the warrant requirement (*Id.*, 16a-18a). The court also added in accord with the district court's decision, that "there was no special exigency justifying a warrantless search under the circumstances of this case" (Pet. App. 19a).

Stage 4: In its petition for a writ of certiorari the government has presented yet another theory to justify the neglect of the law enforcement officers to obtain a warrant before searching the footlocker. Now the government argues that there was never any need for the officers to secure a warrant to search the footlocker believed to contain contraband because a warrantless search of luggage seized outside a suspect's private premises should *not be treated as "presumptively unreasonable"* (Pet. at 8) (emphasis added). As will be demonstrated below, this position calls for the formulation of a new, unprecedented exception to the warrant requirement.

Reasons for Not Granting the Writ.

This Court should not grant the writ because (1) the government seeks certiorari on an issue never properly crystallized or

directly ruled upon below and further muddied by a confusing and fragmented record; and (2) the new theory now advanced by the government would constitute a drastic curtailment of the Fourth Amendment which finds no support in any decisions of this Court, and in any event would be wholly unsupported on the factual record of this case.

(1) This is not an appropriate case in which to consider formulating a new *per se* rule validating all warrantless searches of luggage on probable cause. Because of the government's shifting stance throughout the prior proceedings, the theory now advanced by the government was never properly presented or addressed below and neither lower court based its decision on a *rejection* of it. While the court of appeals noted that "part of [the government's] argument [on appeal] *suggests* that it may also be *looking in the direction* of liberalized luggage searches" (Pet. App. 16a, emphasis added), that court expressly stated: "we understand the Government to be relying on the search-incident-to-arrest exception" (*Id.*) and it was on that basis that the court decided the merits of the footlocker search.[8] (See *Id.*, 11a-15a). So too the district court decided the case on grounds different from that now raised by the government. The government in effect asks this Court to depart from tradition and to review an issue framed in the first instance in a petition for certiorari, without the benefit of a crystallized record to inform the Court. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Also see Bickel, Alexander M., Foreword: The Passive Virtues, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40 (1961).

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[8] The court of appeals' discussion (Pet. App. 16a-18a) of the possibility of a new rule for luggage — in which it rejects that result — is, in effect, *dictum* and cannot be said to provide a proper foundation for a writ of certiorari to be granted on this issue.

Moreover, the government's current stance chops up the case in a fashion which is neither logical nor factually defensible. While seeking certiorari on a theory that luggage, lawfully in the custody of government agents, especially after an arrest, may be searched without a warrant (see Pet. 16), the government applies that theory to the footlocker but omits the two suitcases from its reach. Yet, as both lower courts found, just minutes before this arrest Machado and Leary had taken possession of the two suitcases as well as the footlocker (Pet. App. 3a, 35a), and at the time of defendants' arrest at least one of the suitcases was located in the trunk of the car with the footlocker and the other was within Leary's reach (see *id.*, 4a, 57a). Since the agents plainly had probable cause to arrest Machado as a drug trafficker believed to be shipping marijuana across country,[9] there is no reason for the government to seek to apply its proposed new luggage exception to one portion of Machado's luggage but not to the other. This is particularly so since the government attempts to support its argument for certiorari by pointing to respondents' "diminished" privacy interest in their "personal effects" after a lawful arrest (Pet. 17-18). Since Machado's suitcases were no less "personal effects" than the footlocker — and, indeed, because of their "size, accessability and portability," may be likened more to the "personal effects" found on an arrestee's person than could the large, unwieldy and double-locked footlocker (see Pet. App. 14a-15a) — any luggage exception to the warrant requirement for Machado's footlocker should certainly apply to the suitcases as well.

The evident inconsistencies between the government's treatment of the footlocker, on the one hand, and the two

[9] Machado never contested the lawfulness of his arrest and the court of appeals noted that it had "no doubt that the agents had probable cause to arrest him" (*Id.*, 10a, n. 2).

suitcases, on the other, underscore the confusions in theory which have characterized the government's arguments throughout this case.[10] To grant certiorari on such a record would be to reach out to decide a controversial and difficult constitutional issue in a factual and legal setting that does not call for its resolution by this Court.

(2) The theory advanced by the government at this stage is, in any event, ill-conceived. The essence of the government's position is that a new rule should be carved out for searches of luggage believed to contain contraband: from now on such searches "conducted *outside the judicial process*, without prior approval by judge or magistrate" (see *Katz* v. *United States*, 389 U.S. 347, 357 (1967)), are to be deemed *per se reasonable* under the Fourth Amendment — without regard to whether the "search-incident exception" applies[11] or

[10] A further confusion at this current stage results from the fact that the government is not seeking certiorari on the issue of Chadwick's arrest, which was ruled invalid below. The government notes at one point that one of its arguments — that "[r]espondents' privacy interest in their personal effects was further diminished by the fact that they were under lawful arrest at the time of the search" (Pet. at 18) — "does not apply to respondent Chadwick if the court of appeals was correct in concluding that his arrest lacked probable cause." *Id.*, at n. 12. By this statement the government appears to suggest that it believes that the *other* arguments which it asserts in its petition *do* apply to Chadwick. This would be an absurd result since, in finding that there was no probable cause to arrest Chadwick, both lower courts found that Chadwick had a "possessory interest [in the luggage] so slight that one [could] not fairly infer knowledge of the contents from that fact" (Pet. App. 25a; see 40a-43a).

[11] The government apparently concedes the findings of both lower courts that the footlocker was not within the immediate control of respondents at the time of their arrest (see Pet. 5, n. 2, where the government expressly states that the suitcases, which were in virtually the same place as the footlocker, were not within respondents' immediate control). Accordingly, the government does not attempt to tie its theory of a luggage exception to an incident-to-arrest situation. It does, however, argue that, when an arrest has occurred, the agents should have even greater freedom to search the arrestee's luggage — apparently wherever it is found — without the burden of being obliged to seek a warrant. See Pet. 16-18.

whether exigent circumstances compel swift police action — as long as they take place *outside the suspect's home or office* (see Pet. 8, 10, 13, 16). This position turns the Fourth Amendment on its head; it transforms "the most basic constitutional rule in this area" — that a warrant *must* be obtained unless one of the "few specifically established and well-delineated exceptions" applies (*Katz* v. *United States, supra,* at 357) — into the exception.[12]

The wrongheadedness of this result is the product of the three wrongheaded steps upon which it is built. The government contends (1) that "there is no support in the history or language of the Fourth Amendment for the view that every search or seizure — regardless of the nature of the privacy interest at stake — is presumptively invalid where a warrant could have been but was not obtained" (Pet. 12-13); (2) that "whether a search or seizure without a warrant should be deemed presumptively unreasonable depends on a determination whether the privacy interest at stake is of such magnitude that the interposition of a neutral and detached magistrate should be required to make the probable cause determination" (Pet. 13); and (3) that "footlockers and other items of portable personal property" are subject to the same "diminished expectation of privacy" as are automobiles (and as well are movable) and therefore an analogue to the automobile exception should apply (Pet. 13-14).

The first contention, that history does not support the presumptive invalidity of all warrantless searches, is simply inaccurate. The Fourth Amendment was drafted and adopted in a context in which *no* search and seizure took place lawfully

[12] Under the government's proposed new rule a warrant would be necessary only in that narrow class of cases in which police breach the confines of a home or office without the justification of consent, "plain view," "incident to arrest," "hot pursuit," or other "emergency situations." See *United States* v. *Mapp,* 476 F. 2d 67, 76 (2d Cir. 1973). Whether the warrant requirement would survive at all is questionable.

without *some* form of warrant or writ. See Lasson, Nelson B., *The History and Development of the Fourth Amendment to the United States Constitution* (1937), at 54-55, 100-103; Schwartz, Bernard, *The Bill of Rights: A Documentary History,* vol. 1, part 3, "Revolutionary Declarations and Constitutions, The Rights of the Colonists and a List of Infringements and Violations of Rights (1772)," at 205-206. Indeed, it was settled at common law that a search and seizure, even of contraband, could not be made without a warrant except if expressly authorized by statute. *In re Swan,* 150 U.S. 637, 650 (1893). Thus Chief Justice Shaw of the Supreme Judicial Court of Massachusetts said:

> The authority to seize liquors without a warrant, though sometimes necessary, is a high power; and, being in derogation of common law right, it is to be exercised only where it is clearly authorized by the statute or rule of law which warrants it. *Kennedy* v. *Favor,* 14 Gray, 200, 202 (1859), quoted in *In re Swan, supra,* at 649.

To be sure, the warrants or writs which were used in colonial times to authorize searches and seizures were often general "writs of assistance" which did not specify with particularity the object of the search; but nonetheless no search and seizure — including searches and seizures of boxes, trunks, chests and other receptacles aboard ships in the harbor, suspected of containing contraband — could take place lawfully except by warrant. See Schwartz, *supra*; Lasson, *supra.* The Fourth Amendment was in fact designed not to impose a warrant requirement where none had existed before, but rather to regulate the proper *form* of the warrant and to ensure *more protection* than a general warrant alone had been

able to provide. *Id.* Accordingly, contrary to the government's claim, the history of the Fourth Amendment does indeed support the view that "every search and seizure — regardless of the nature of the privacy interest at stake — is presumptively invalid where a warrant could have been but was not obtained."[13]

The government's second contention concerning the "magnitude" of "the privacy interest at stake" misses the essential point of the warrant requirement. Just two weeks ago, on July 6, 1976, while considering whether a non-investigatory automobile search was "reasonable" under the Fourth Amendment; this Court had occasion to discuss the basis for the Fourth Amendment's requirement of a warrant, over and above its requirement of "reasonableness." *South Dakota* v. *Opperman*, ___ U.S. ___, ___, 44 L.W. 5294, 5295, n. 5. The Court did not suggest in any way that the warrant requirement depended upon a certain "magnitude" of the "privacy interest at stake"; rather, the Court reaffirmed in the context of automobiles — which concededly allow a "lesser expectation of privacy" than do homes and offices — a long-established understanding that the warrant requirement "depends" upon the need to protect the citizen against a hasty, ill-founded determination of "probable case":

> We have frequently observed that *the warrant requirement assures that legal inferences and conclusions as to probable cause will be drawn by a neutral magistrate* unrelated to the criminal investigative-enforcement process. *Id.* (Emphasis added.)

[13] As this Court recently noted, the Fourth Amendment "was primarily a reaction to the evils associated with *the use of the general warrant* in England and *the writs of assistance* in the Colonies. . . ." *Stone, Warden* v. *Powell*, ___ U.S. ___, ___, 44 L.W. 5313, 5318 (July 6, 1976).

In his concurring opinion Mr. Justice Powell amplified this same point:

> In the criminal context the requirement of a warrant protects the individual's legitimate expectation of privacy against the overzealous police officer. "Its protection consists in requiring that those inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). See, e.g., *United States* v. *United States District Court*, [407 U.S. 297, 316-318 (1972)]. . . . A related purpose of the warrant requirement is to prevent hindsight from affecting the evaluation of the reasonableness of a search. See *United States* v. *Martinez-Fuerte*, ___ U.S. ___, ___ (1976); cf. *United States* v. *Watson*, ___ U.S. ___, ___, n. 22 (1976). 44 L.W. at 5299.

See also *United States* v. *Martinez-Fuerte*, ___ U.S. ___, 44 L.W., 5336, 5342 (July 6, 1976).

The government's single-minded focus on the "magnitude" of the privacy interest makes no provision for these critical protective aspects of the warrant requirement. Indeed, its proposed new rule could have wide-ranging and devastating implications: a citizen could no longer carry personal belongings outside of the home or office in any kind of container or carrying case, even if locked and even if carried with the intent of transporting them to other warrant-protected premises, without risking exposure of those belongings to suspicious, prying — and uncontrolled — eyes of government officials.

The government's third contention mistakenly equates luggage and automobiles without taking into account the relevant and substantial *differences* between the two. Those differences are underscored by this Court's explanation in *South Dakota* v. *Opperman*, *supra*, as to the basis for the lesser expectation of privacy in an automobile than in a private residence or office:

> Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.
>
> The expectation of privacy as to autos is further diminished by the obviously public nature of automobile travel. Only two Terms ago, the Court noted:
>
> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and *it seldom serves as one's residence or as the repository of personal effects*. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis*, 417 U.S. [583, 590 (1974)]. (Emphasis added).

In the interests of public safety and as part of what the Court has called "community caretaking functions," *Cady* v. *Dombrowski*, [413 U.S. 433, 441 (1973)], automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be

> removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.[14] 44 L.W. at 5295.

Luggage, unlike the automobile, is not "subjected to pervasive and continuing regulation and controls, including periodic inspection and licensing requirements."[15] Nor are pieces of luggage "frequently taken into police custody" for "public safety" purposes. Moreover, luggage, unlike the automobile, is precisely intended to be a *"repository of personal effects"*; and although luggage may "travel" in the

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[14] In his concurring opinion Mr. Justice Powell does point out that, in any event, "privacy" is not entirely eliminated even in the context of automobiles.

> Although the expectation of privacy in an automobile is significantly less than the traditional expectation of privacy associated with the home, *United States* v. *Martinez-Fuerte*, *supra*, at ____; *United States* v. *Ortiz*, [422 U.S. 891, 896, n. 2 (1975)]; see *Cardwell* v. *Lewis*, 417 U.S. 583, 590-591 (1974) (plurality opinion), the unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances. 44 L.W. at 5298; see also *id.*, 5297, n. 1.

[15] Even when luggage is inspected as a condition to boarding an aircraft, that inspection is generally confined to a minimally intrusive technique, such as use of a magnetometer to detect the presence of lethal weapons or explosives, and does not involve opening luggage for visual inspection unless the magnetometer indicates the necessity for doing so. See, *e.g.*, *United States* v. *Albarado*, 495 F. 2d 799 (2d Cir. 1974).

sense that others transport or move it on public thoroughfares, rarely if ever are its contents intentionally exposed to "plain view."[16] Here, of course, the luggage at issue was opaque and securely locked; no waiver of privacy or forfeiture of Fourth Amendment rights can be inferred. See *United States* v. *Kim*, ____ F. Supp. ____, 45 L.W. 2014, 2015 (U.S. Dist. Ct., Haw., June 9, 1976).

Finally, in addition to the theoretical confusions and misconceptions in the government's current legal position, key fact findings in this case warrant denial of the writ. Both lower courts found that "the footlocker was not an area within the arrestee's immediate control" (Pet. App. at 13a; see 56a) and "no special exigency [existed] justifying a warrantless search under the circumstances" (*Id.*, 19a; see 50a-51a). Yet virtually all of the decisions cited by the government as upholding luggage searches (see Pet. at 10-12, notes 4-8) relied upon either the "search-incident exception" or a determination that exigent circumstances existed.[17] Also, almost all of these cases

[16] In *South Dakota* v. *Opperman* the one part of the car not opened and inspected in the course of the approved "inventory search" — the locked trunk — was precisely that part of an automobile whose contents are not typically exposed to "plain view" and which is not "a customary place for documents of ownership and registration" as is the glove compartment. See 44 L.W. at 5296.

[17] The following cases upheld luggage searches on a "search incident" theory: *United States* v. *Battle*, 510 F. 2d 776 (D.C. Cir. 1975); *United States* v. *Kaye*, 492 F. 2d 744 (6th Cir. 1974); *United States* v. *Ciotti*, 469 F. 2d 1204 (3d Cir. 1972), vacated on other grounds, 414 U.S. 1151 (1974); *United States* v. *Maynard*, 439 F. 2d 1086 (9th Cir. 1971); *United States* v. *Mehciz*, 437 F. 2d 145 (9th Cir. 1971) (although the text of this opinion does not make clear the basis for its result, the same court of appeals in the later case of *United States* v. *Maynard*, *supra*, stated that in *Mehciz* "we upheld a warrantless search of a suitcase incident to the lawful arrest of its carrier," 439 F. 2d at 1087); *United States* v. *Buckhanon*, 505 F. 2d 1079 (8th Cir. 1974) (here the court stated that it was relying on the reasoning of *Mehciz*, 505 F. 2d at 1082); *United States ex rel. Muhammad* v. *Mancusi*, 432 F. 2d 1046 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971); *United States* v. *Robbins*, 424 F. 2d 57 (6th Cir. 1970); *United States* v. *Eatherton*, 519 F. 2d 603 (1st Cir. 1975). All of these cases but two involved situations where the item searched was a suitcase (or in one case a shopping bag) being carried in hand at the time of arrest; the two exceptions, *United States* v. *Ciotti* and *United States* v. *Robbins*, involved suitcases seized from motel rooms within the scope of *Chimel*.

See also *United States* v. *Soriano*, 497 F. 2d 147 (5th Cir. en banc 1974) (in which court upheld luggage search as *part* of an automobile search but suggested that the search-incident exception would likely have been applicable had the government relied upon the theory).

The following cases upheld luggage searches on an exigent circumstances theory: *United States* v. *Valen*, 479 F. 2d 467 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974); *United States* v. *Johnson*, 467 F. 2d 630 (2d Cir. 1972), cert. denied sub nom. *White* v. *United States*, 410 U.S. 932 (1973); *People* v. *McKinnon*, 7 Cal. 3d 899, 500 P. 2d 1097 (1972); *Waugh* v. *State*, 20 Md. App. 682, 318 A. 2d 204 (1974), reversed on other grounds, 275 Md. 22, 338 A. 2d 268 (1975); *Chaires* v. *State*, 480 S.W. 2d 196 (Ct. Crim. App. Texas, 1972); *State* v. *Wolfe*, 5 Wash. App. 153, 486 P. 2d 1143 (1971). See also *United States* v. *Wilson*, 524 F. 2d 595 (8th Cir. 1975), cert. denied, No. 75-5884, March 1, 1976 (in which the court relied on "plain view" rationale since the barrel of a shotgun was showing, but suggested in *dictum* that the exigency rationale of the "automobile exception" would also be applicable). These cases also all involved suitcases or similarly sized objects.

involved searches of small, easily portable suitcases or containers — not a 200-pound double-locked footlocker which could not be opened without keys nor moved without the help of two or three men (see cases, note 17, *supra*). Indeed, it is the two small suitcases in this case — with respect to which the government does *not* seek certiorari — which, because of their ease of access and ready portability (see Pet. App. 14a-15a), come closer to fitting within the search-incident and exigent-circumstances decisions relied upon by the government. Accordingly, the government seeks certiorari on a factual record which departs significantly from those of other cases in which courts have upheld warrantless luggage searches.

Conclusion.

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 75-1721

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. CHADWICK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondents contend (Br. in Opp. 9; emphasis in original) that "[b]ecause of the government's shifting stance throughout the prior proceedings, the theory now advanced by the government was never properly presented or addressed below and neither lower court based its decision on a *rejection* of it." We submit that this is inaccurate. The government has consistently objected to the application of a presumptive warrant requirement to the opening of respondents' footlocker.

Our brief in the court of appeals noted that the guiding standard of the Fourth Amendment is reasonableness, and that "[t]he test of 'reasonableness,' in turn, hinges upon the very purpose of the Fourth Amendment" (Br. 10).[1] We then argued that the history of the Fourth

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[1]A copy of this brief is being lodged with the Clerk of this Court.

Amendment demonstrates that "the sanctity of a house * * * enjoys a far more precious and valued role than that of a footlocker" (*ibid.*), that "the sanctity of one's home was the very reason for the Fourth Amendment itself," and that accordingly "the limitations applicable to warrantless searches of houses cannot—and should not—be applied to a footlocker in a doctrinnaire fashion" (*id.* at 11). We cited decisions from other circuits that have agreed with us that there is a "'constitutional difference' between a house and a suitcase" (*United States* v. *Mehciz*, 437 F. 2d 145, 147 (C.A. 9)) and therefore "would apparently allow the warrantless search of luggage for contraband upon the individual officer's determination of probable cause" (Pet. App. 16a). This brief adequately presented to the court of appeals both the question presented in our petition and the analysis with which our petition approached that question.

Indeed, the court below devoted nearly half of its discussion on this point to that "part of [the government's] argument" (Pet. App. 16a) suggesting that the government "may also be looking in the direction of liberalized luggage search rules approved in several other circuits" (*ibid.*). The court expressly declined to follow the reasoning of the cases cited in our brief (*id.* at 16a n. 7, 18a-19a). The dissenting judge relied on these cases, arguing that the warrantless search of the footlocker was proper. He emphasized, as had our brief, that "[n]o invasion of a house or other real property was involved in this case" (*id.* at 30a n. 1). Both the majority and dissenting opinions below thus addressed the question we have presented, and did so in the way we have presented it. Had the majority accepted our argument, it would have upheld the propriety of the search, as the dissenting judge urged.

2. Respondents also contend (Br. in Opp. 10) that our argument "chops up the case in a fashion which is neither logical nor factually defensible" because it distinguishes the opening of the footlocker from the opening of the suitcases. But the search of the suitcases had been justified as an "inventory" search below, a justification that presents problems distinct from those concerning the search of the footlocker on probable cause. Cf. *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976. Our position concerning the footlocker depends in part on the existence of probable cause to believe that it contained marijuana.[2] There was no similar probable cause to believe that the suitcases contained marijuana, and there is thus no illogic in our distinction.

3. Respondents argue (Br. in Opp. 3, 11 n. 10) that "confusion" has resulted from our decision not to seek review of the court of appeals' decision that Chadwick was not properly arrested. They state that it is "absurd" to seek to introduce the fruits of the footlocker search against Chadwick in light of the lower courts' finding that, at the time of Chadwick's arrest, the information known to the agents did not show that Chadwick had a possessory interest in the footlocker sufficient to allow the agents to "infer [that Chadwick had] knowledge of the contents" (Pet. App. 25a, 40a-43a).

The connection respondents attempt to make between the issue of the footlocker search and that of Chadwick's arrest is a frail one. The validity of Chadwick's arrest was at issue below primarily because of the government's desire to offer in evidence statements that he made to an

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[2]We recognize the danger, adverted to by the court of appeals (Pet. App. 13a n. 4) that "if the mere fact of arrest were to allow an unlimited baggage search, it might be feared that people would be arrested on technicalities in order to search all their belongings."

agent following his arrest. Having found that Chadwick's arrest was without probable cause, the district court went on to find that the statements to the agent were "tainted" by the illegal arrest (Pet. App. 24a). Chadwick's arrest does not "taint" the footlocker search, however, since the seizure and search of the footlocker were not the product of his arrest. The evidence therefore should be admissible against Chadwick, although it may not by itself be sufficient to convict him.[3]

In any event, our arguments apply with full force to respondents Machado and Leary. Whatever weaknesses there may be in the government's attempt to prosecute respondent Chadwick, they afford no support to those respondents.[4] The issue whether the agents properly opened the footlocker without a warrant is analytically separable from the other issues presented in the court of appeals, and our decision to petition for a writ of certiorari on that issue alone results in neither "confusion" nor a distortion of the record.

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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[3]Respondent Chadwick's asserted lack of a possessory interest in the footlocker would be a defense on the merits at trial, but he should not be allowed to convert it into grounds to challenge the *admissibility* of the footlocker or its contents. Indeed, his assertion, if true, merely establishes his lack of standing to challenge the search of the footlocker.

[4]Cf. Pet. 18 n. 12, which concedes that in some respects respondent Chadwick's claims stand on a different footing from those of respondents Machado and Leary.

Supreme Court, U. S.
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No. 75-1721

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. CHADWICK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1721

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. CHADWICK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 532 F. 2d 773. The opinion and supplemental opinion of the district court (Pet. App. 32a-63a) are reported at 393 F. Supp. 763.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on March 29, 1976. On April 19, 1976, Mr. Justice Brennan extended the time in which to file a petition for a writ of certiorari to and including May 28, 1976. The petition was filed on May 26, 1976, and was granted on October 4, 1976 (A. 83). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a search warrant is required before federal agents may open a locked footlocker that is properly in

their possession and that they have probable cause to believe contains contraband.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U.S.C. 881(a) provides in part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
>
> • • • • •
>
> (3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).
>
> • • • • •

STATEMENT

1. On May 8, 1973, Amtrak railroad officials informed federal narcotics agents in San Diego, California, that respondents Gregory Machado and Bridget Leary had loaded a brown trunk or footlocker onto a train bound for Boston, Massachusetts (Pet. App. 34a) and that the officials believed the footlocker to contain "a large quantity of marihuana" (A. 53). The basis for this belief was that the footlocker was leaking talcum powder, which is often used to mask the odor of controlled substances such as marijuana or hashish (A. 15), that the footlocker had an unusual weight for its size (A. 17), and that Machado matched a profile used by the railroad to spot drug traffickers (Pet. App. 34a). The federal agents relayed this information to their counterparts in Boston.

The train arrived at South Station in Boston on the evening of May 10, 1973, and federal agents met it at the station. The agents saw Machado make a telephone call after his arrival, but they were unable to see the number called or to overhear the conversation (Pet. App. 35a). They also observed the footlocker as it was removed from the train, placed on a baggage cart, and taken to the station area, where it was claimed by Machado and Leary. The two then placed the trunk on the floor nearby their suitcases and sat down on it (Pet. App. 3a).

The agents confirmed their suspicions by having a dog trained to recognize the smell of contraband substances approach the footlocker.[1] The dog "alerted" to the footlocker by scratching on it, indicating that a controlled substance was inside. The agents did not have the dog sniff the suitcases (Pet. App. 4a, 35a).

Respondent Joseph Chadwick soon arrived at the station in an automobile. After talking with Machado and Leary for a moment, Chadwick left the terminal, went outside to

---

[1] Investigation with the aid of a trained dog is permissible under the Fourth Amendment. *United States* v. *Solis*, 536 F. 2d 880 (C.A. 9); *United States* v. *Race*, 529 F. 2d 12 (C.A. 1); *United States* v. *Bronstein*, 521 F. 2d 459 (C.A. 2), certiorari denied, 424 U.S. 918; *United States* v. *Fulero*, 498 F. 2d 748 (C.A. D.C.).

the street, and opened the trunk of the car. With the assistance of a porter, Leary and Machado took their belongings to Chadwick's car and loaded the footlocker and one suitcase into the trunk; Leary took the other suitcase and entered the front seat (Pet. App. 35a, 52a-53a). While the automobile trunk was still open and Chadwick and Machado were standing beside it, the agents arrested all three respondents. A search of the two men produced a small quantity of marijuana on Chadwick and a key to and receipts and documents of ownership of the footlocker on Machado. Respondents were then taken to the agents' office in the federal building in Boston (A. 43). The footlocker and the two suitcases were also taken to the agents' office, where, approximately 90 minutes after the arrests and seizure, they were opened. Inside the footlocker and both suitcases the agents found substantial amounts of marijuana (Pet. App. 5a, 7a, 8a, 35a-36a).

2. On November 2, 1973, an indictment returned in the United States District Court for the District of Massachusetts charged respondents Machado, Leary and Chadwick with possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with conspiracy to commit that crime, in violation of 21 U.S.C. 846. Respondents filed pretrial motions to suppress incriminating statements made by Chadwick after his arrest and the evidence obtained from the footlocker and the suitcases. In reply, the government argued that the search of the suitcases was a proper inventory inspection, necessary to protect agents against charges that they had stolen property that had been seized. It justified the opening of the footlocker both as a search incident to an arrest and as a search based upon the "automobile exception" to the Warrant Clause of the Fourth Amendment. The district court rejected each of these arguments and suppressed the evidence obtained from

the searches (Pet. App. 45a-51a, 54a-61a). It also suppressed Chadwick's statements, holding that there had not been probable cause to arrest him and that the statements were tainted fruit of the illegal arrest (*id.* at 37a-44a, 62a-63a).

3. A divided court of appeals affirmed the suppression of the marijuana found in the footlocker.[2] The court concluded that the footlocker had been properly seized (Pet. App. 17a, 19a). It then inquired whether it was reasonable to open it. Beginning with the premise that warrantless searches are presumptively unlawful in the absence of one of a few narrow circumstances, the court stated that "[t]he question • • • is whether [this] warrantless search fits

[2] The court of appeals also affirmed the district court's suppression of respondent Chadwick's statements and the marijuana found in the suitcases. We do not agree that there was not probable cause to arrest Chadwick or that his admissions, after receiving *Miranda* warnings (A. 30), were necessarily the product of his allegedly illegal arrest (see *Brown* v. *Illinois*, 422 U.S. 590), but we did not present these as questions for this Court because they appear to involve only the application of settled principles to particular facts. As to the opening of the suitcases, we believe that under many circumstances it is reasonable to inspect personal belongings discovered near a person at the time of his arrest in a public place, a proposition with which the court of appeals has agreed. See Pet. App. 23a; *United States* v. *Eatherton*, 519 F. 2d 603 (C.A. 1), certiorari denied, 423 U.S. 987. In the present case, however, the agents did not have probable cause to believe that the suitcases contained contraband, and the only justification offered in the court of appeals for the inspection was the agents' desire to "inventory" their contents, a justification that presents problems distinct from those concerning the search of the footlocker on probable cause. See *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976; *United States* v. *Friesen*, C.A. 9, No. 75-1199, decided November 12, 1976. Under these circumstances, we did not seek review of the judgment of the court of appeals insofar as it affirmed the district court's suppression of the marijuana seized from the suitcases.

within one of the exceptions to the constitutional requirement of a warrant" (*id.* at 8a). It concluded that it did not.

The "automobile exception" did not control, the court held, because the seizure of the footlocker occurred just after it had been deposited in the parked car's trunk and before any effort had been made to drive the car away. In these circumstances, the car "was nothing more than a platform or resting place for the footlocker," and the court perceived no reason "why the footlocker's placement in the car trunk should make it any more searchable than if the arrest had occurred in the station area" (*id.* at 10a).

The court also held that the opening of the footlocker could not be justified as incident to the arrest of respondents. Noting that the trunk was securely locked and weighed approximately 200 pounds, the court held that the trunk was not "in any meaningful sense • • • under [respondent's] immediate control" at the time of their arrest, because they could not have either quickly removed it or reached inside it to destroy evidence or obtain weapons (*id.* at 15a).

Finally, the court rejected the argument that movable containers, such as footlockers, that are properly seized in a public place, should be treated like automobiles and should be subject to search, without a warrant, if probable cause exists to believe that they contain evidence of a crime. The court conceded that "baggage or goods in transit present some of the same characteristics as automobiles. Unless immobilized, such items may disappear before a warrant is obtained" (Pet. App. 17a). Expressly declining to follow other courts of appeals in this regard, however, the court refused to permit the warrantless search of the footlocker. The court believed that a rule allowing the search of such belongings on probable cause has not "received sufficient

recognition by the Supreme Court outside the automobile area, or generally, for us to recognize it as a valid exception to the fourth amendment warrant requirement" (*ibid.*). It concluded that "[i]f an exception of this character is to be translated to an entirely different class of objects, we think the Supreme Court should make the judgment" (*id.* at 18a-19a).

The dissenting judge, aligning himself with other courts that the majority had declined to follow, argued that the opening of the footlocker was proper once "there was probable cause to believe that it contained contraband and was being used in committing the offense" (Pet. App. 29a). In his view, "the principles which control the right of an officer to arrest without a warrant a person who is committing a felony in his presence in a public place should also permit the officer to open a suitcase, a footlocker or other container which he has probable cause to believe is being used to commit the offense in his presence and to seize the contraband therein" (*id.* at 29a-30a; footnote omitted).

ARGUMENT

I. INTRODUCTION AND SUMMARY

The federal narcotics agents who arrested respondents at South Station on the evening of May 10, 1973, had probable cause to believe that the footlocker in respondents' possession contained a controlled substance. Their seizure of the footlocker without a warrant, as the court of appeals agreed, was unquestionably reasonable under the circumstances. The court held, however, that, without regard to whether the agents' conduct in searching the footlocker immediately upon its removal to their offices was similarly reasonable, the search violated the Fourth Amendment because it did not fall within one of "a few specifically estab-

lished and well-delineated exceptions" to the constitutional requirement of a warrant.

This case thus raises once again an issue that has sparked the "conflict that has been so notable in this Court's attempts over a hundred years to develop a coherent body of Fourth Amendment law" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 474). This conflict has been "caused by disagreement over the importance of requiring law enforcement officers to secure warrants" (*ibid.*). The underlying basis of that disagreement was summarized by Mr. Justice Stewart in *Coolidge* (*id.* at 474-475; footnote omitted):

> Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." As to other kinds of intrusions, however, there has been disagreement about the basic rules to be applied, as our cases concerning automobile searches, electronic surveillance, street searches and administrative searches make clear.

This case (unlike *Coolidge*) does not involve "a search or seizure carried out on a suspect's premises" and therefore does not implicate the "accepted • • • principle, that [such] a search or seizure • • • without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances' " (403 U.S. at 474-475). Rather, it involves the kind of search and seizure with regard to which there has been uncertainty and disagreement "about the basic rules to be applied" (*id.* at 475).

A. Our primary submission is that the guiding standard of the Fourth Amendment is reasonableness (see *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976, slip op. 5-6) and that not all interferences with a person's liberty or privacy are of equal magnitude or demand equal protection. Whether a search or seizure is reasonable within the meaning of the Fourth Amendment must depend "upon the facts and circumstances of each case" (*Cooper* v. *California*, 386 U.S. 58, 59) and "the context in which [the Fourth Amendment right] is asserted" (*Terry* v. *Ohio*, 392 U.S. 1, 9). Each governmental intrusion must be tested both by its justification—which generally will be probable cause to believe that contraband or evidence of the commission of a criminal offense will be found in the area searched—and by the strength of the privacy interests invaded by the search.

In making this argument, we are not disputing what "is by now axiomatic[,] that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause' " (*Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (Powell, J., concurring)), nor are we denying that both the concept of probable cause

and the presence or absence of a warrant must be considered as bearing on the reasonableness of a search. We do contend, however, that not all warrantless searches are unreasonable *per se* merely because a warrant could have been but was not obtained. Whether a warrantless search or seizure should be deemed presumptively unreasonable must depend upon a discriminating appraisal of whether the particular privacy interest at stake is sufficiently important that any intrusion must be justified not only by probable cause but also by a determination of probable cause by a neutral and detached magistrate in advance of the search.

B. This view finds support both in the text of the Fourth Amendment, which secures "persons, houses, papers, and effects, against unreasonable searches and seizures • • •," and in its historical underpinnings. While the Warrant Clause of the Amendment ensures that warrants shall not issue except upon probable cause and the satisfaction of a number of procedural requisites, the historical evidence indicates that that provision was not intended by the Framers to alter the plain meaning of the initial clause or to render every search undertaken without a warrant unreasonable in the absence of exigent circumstances. Indeed, the relevant "legislative history" suggests that the primary, if not the sole, purpose of the Fourth Amendment was to prohibit the use of so-called "general warrants" rather than to prohibit warrantless searches, that the initial drafts of the Amendment accomplished this purpose and nothing more, and that the language ultimately adopted may have been the result of oversight.

It is not surprising that the Congress that wrote the Fourth Amendment was more troubled by the evils of searches backed by defective warrants than by searches

without warrants. The Framers' prime concern was with the search of the home. Although a warrant had always been necessary for such entries, the requirement had been abused. The Amendment was the product of the recent experience with general warrants, under which entries into and rummaging of the home had been authorized and executed by the King's agents without probable cause to believe that a crime had been committed or that evidence would be found therein. Such warrants were eventually condemned by the English courts and thereafter by Parliament, and it was the intent of the Framers to write that condemnation into the Constitution.

Warrantless searches, on the other hand, evolved in an entirely different historical context and led to none of the same abuses. Such searches occurred outside the dwelling, so that the privacy interest was significantly less, and their victims ordinarily were those who had been caught in the act of committing a crime or were the objects of hue and cry or an arrest warrant. Accordingly, it was early concluded that the privacy of an individual at the time of a search incident to an arrest was sufficiently protected by the requirement for probable cause underlying the arrest. The lawful restraint and incidental search were not considered to entail the kind of wholesale and wide-ranging invasion of privacy for which a warrant requirement in connection with a home was considered appropriate, and the Framers were instead content to leave such searches to the test of reasonableness.

C. Although not expressly articulated, this analysis pervades the Court's decisions and explains the tensions in the Court's Fourth Amendment jurisprudence to which Mr. Justice Stewart adverted in *Coolidge*. The Court has recognized that the conflicting interests of the individual to be free of unjustified searches and seizures and of society to

apprehend and punish those suspected of crime should be accommodated by strict enforcement of the requirement of probable cause, and that only in those privacy areas "at the core of the Fourth Amendment" (*Wolf* v. *Colorado*, 338 U.S. 25, 27)—areas in which, both for historical and practical reasons, antecedent judicial scrutiny contributes substantial protection to the privacy right—should the determination of reasonableness be inextricably bound with the requirement of a warrant. In other cases, "the Court [has] held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable • • •." *United States* v. *Edwards*, 415 U.S. 800, 807.

Thus, the Court has identified certain contexts, primarily the search of homes, offices, or private communications, in which the intrusion so impinges upon an individual's expectation of privacy that a warrantless search or seizure, even upon probable cause, is considered unreasonable *per se* "subject only to a few specifically established and well-delineated exceptions" (*Katz* v. *United States*, 389 U.S. 347, 357). In contexts in which core privacy interests are not similarly implicated, such as the search of an automobile on a public street, the reasonableness of the intrusion has been held to depend solely upon the sufficiency of the justification, *i.e.*, the existence of probable cause, rather than upon the presence or absence of a warrant (see *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42). And yet other types of searches and seizures have been considered sufficiently limited in intrusiveness that their reasonableness not only does not depend upon procurement of a warrant but may rest on suspicion not amounting to probable cause (see, *e.g.*, *United States* v. *Brignoni-Ponce*, 422 U.S. 873; *Terry* v. *Ohio*, *supra*).

D. Application of this calculus to the facts of the present

case demonstrates the reasonableness of the agents' conduct. The agents did not search a home, a place of business, or similar areas—those places for which a warrant historically has been required and for which prior resort to a magistrate would assist greatly in the minimization of the intrusion. Nor did they search personal effects that could be found only by entering private premises (see, *e.g.*, *Coolidge* v. *New Hampshire*, *supra*; *Chimel* v. *California*, 395 U.S. 752). Nor, lastly, was the search an invasion of a person's private thoughts or communications, a "core" privacy interest as to which the locus of the intrusion may fairly be deemed irrelevant.

Rather, the agents searched a movable container that they had probable cause to believe contained contraband and that they encountered in a public place under circumstances recognized by the court of appeals to justify seizing it forthwith. Once that lawful intrusion had occurred, respondents' privacy interest in the contents of the footlocker had diminished to the point that a further intrusion, on probable cause, should not be held to require the prior interposition of a magistrate. As this Court stated in *Chambers* v. *Maroney*, *supra*, 399 U.S. at 51-52, to insist upon a search warrant in such circumstances as a necessary ingredient of reasonableness would be to demand precise and wholly unworkable calculations as to what constitutes the "greater" and what the "lesser" intrusion. The value to whatever privacy interest respondents retained in the footlocker that would have been derived from prior judicial approval of the search in this case was insignificant in view of the precisely defined contours of the search.

E. Finally, respondents' privacy interests in their personal effects was further substantially reduced by the fact that they were under arrest at the time of the search. As Mr. Justice Powell observed in *United States* v. *Robinson*,

414 U.S. 218, 237-238 (footnotes omitted), "a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest." Since respondents had already suffered the "serious personal intrusion" of an arrest (*United States* v. *Watson*, 423 U.S. 411, 428 (Powell, J., concurring)), their legitimate expectation of freedom from governmental interference with the footlocker formerly in their possession was insufficient to create an inhibition upon a search of the footlocker on probable cause that could only be removed by the antecedent scrutiny of a magistrate.

While the footlocker may not have been under respondents' "immediate control" (*Chimel* v. *California*, *supra*, 395 U.S. at 763) at the moment of their arrest, that restriction on the scope of a search incident to arrest developed in response to the search of houses or other high-privacy areas conducted without either probable cause or a warrant and based solely on the fortuity of the arrest in that location. It has little relevance, and should have no application, to a search of the belongings of a person who has been arrested in public, where probable cause exists to believe the chattel contains contraband or evidence of a crime related to the arrest.

F. In sum, the rule we urge would provide protection wholly commensurate with the Fourth Amendment interests involved. Searches and seizures that invade areas in which an individual places the greatest expectation of privacy would be presumptively unreasonable in the absence of probable cause and a warrant. Other intrusions, in which the privacy expectation is less and in which a warrant has relatively little useful role to play, would satisfy the Fourth Amendment if they were justified by probable cause and were otherwise reasonable. In every case the subject of the search would have the opportunity for a determination of probable cause by a neutral and detached judicial officer; moreover, law enforcement officers would retain substantial incentives to seek such judicial scrutiny in advance of the search because of the greater deference given to findings of probable cause when a warrant has been obtained. *United States* v. *Ventresca*, 380 U.S. 102, 106; *Aguilar* v. *Texas*, 378 U.S. 108, 111.

II. A WARRANT IS NOT REQUIRED TO MAKE A PROBABLE CAUSE SEARCH OF A CONTAINER THAT HAS BEEN LAWFULLY SEIZED IN A PUBLIC PLACE

A. Searches without warrants are not presumptively unreasonable under the Fourth Amendment

The Fourth Amendment imposes two separate, although related, limitations upon searches and seizures. The first clause of the Amendment "is general and forbids every search that is unreasonable" (*Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357); the second clause places a number of restrictions upon the issuance and character of warrants. Although the Amendment itself does not suggest the interrelation between the two clauses, the Court has stated on a number of occasions that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, *supra*, 389 U.S. at 357. See also *United States* v. *United States District Court*, 407 U.S. 297, 314-321; *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 454-455. It was

on this statement that the court of appeals relied in upholding the district court's suppression of the evidence seized from respondents' footlocker.

We submit that the conclusion of the court of appeals was erroneous. History provides no indication that the proponents of the Fourth Amendment equated warrantless searches and seizures occurring outside the privacy of the home with unreasonable searches and seizures. Nor has any decision of this Court applied a presumptive warrant requirement in a context other than a search of the home or other "core" area of privacy. On the contrary, the search of the footlocker in this case is constitutionally indistinguishable from the warrantless search of an automobile that has been seized on a public street, the reasonableness of which has repeatedly been upheld if based on probable cause.

1. *The historical background of the Fourth Amendment suggests that searches conducted without a warrant were not equated with unreasonable searches*

The Fourth Amendment's proscription of "unreasonable searches and seizures" must be read in light of "the history that gave rise to the words"—a history of "abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution • • •." *United States* v. *Rabinowitz,* 339 U.S. 56, 69 (Frankfurter, *J.*, dissenting).[3]

[3] The history and evolution of the Fourth Amendment have been discussed at length in the decisions of this Court (see, *e.g.*, *Stanford* v. *Texas*, 379 U.S. 476, 481-485; *Marcus* v. *Search Warrant*, 367 U.S. 717, 724-729; *Frank* v. *Maryland*, 359 U.S. 360, 363-365; *Harris* v. *United States*, 331 U.S. 145, 157-161 (Frankfurter, J., dissenting); *Boyd* v. *United States*, 116 U.S. 616, 624-629) and in scholarly treatises (see Taylor, *Two Studies in Constitutional Interpretation* 3-46 (1969); Landynski, *Search and Seizure and the Supreme Court* 19-48 (1966);

The cornerstone of the protection accorded an Englishman from intrusions into his privacy has always been the integrity of the home, a protection that has been traced back to biblical times (Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 13-14 (1937)) and that was reflected in Lord Coke's aphorism that "every man's house is his castle." *Semayne's Case,* 3 Coke Rep. 91a (Fraser ed., pt. 5). At early common law, the principle was so strongly entrenched that the search warrant was unknown and any unconsented entry onto the land of another was a trespass. Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 Calif. L. Rev. 474, 475 (1961). While this extreme position eventually gave way to necessity, the absolute sanctity of the home continued until well into the late middle ages. As Lasson writes (pp. 34-35, n. 78):

> In 1470 • • • it was decided that although it was lawful for an owner of goods to enter upon the land of another who had wrongfully taken them from him, he could not break into his house. *Yearbooks,* 9 Edw. IV, Mich. Pl. 10, cited in Holdsworth, III, 279. A constable broke doors to search at his peril in hue and cry. Sir Matthew Hale, *History of the Pleas of the Crown* (Philadelphia, 1847), II, 98-104. A debtor's house was always considered his asylum and could not be broken into. James Paterson, *Commentaries on the Liberty of the Subject* (London, 1877), II, 231 ff.

The first major exception to this rule occurred in the case of the warrant to search for stolen goods, a judicial order that "crept into the law by imperceptible practice" (*Entick* v. *Carrington,* 19 How. St. Tr. 1030, 1067, 95 Eng. Rep. 807) but that was firmly established by 1650. The victim of a theft could obtain a warrant to search the premises of another if he was willing to swear—on pain of

Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 13-105 (1937).

answering in damages if he were in error—that he reasonably suspected that the stolen goods would be found. Barrett, *Personal Rights, Property Rights, And The Fourth Amendment,* 1960 Sup. Ct. Rev. 46, 50. The stolen goods warrants also encompassed two forms of contraband—goods on which the proper tax had not been paid and the means or instrumentalities of a crime. Kaplan, *supra,* 49 Calif. L. Rev. at 475.

While the warrant for stolen goods breached the sanctity of the home, it was surrounded by procedural safeguards such as an allegation of probable cause under oath, and it could only be issued by a court. During the last decades of the 17th and the first half of the 18th century, however, several events occurred that convinced the colonists that a warrant, without more, was an inadequate protection against abuse of the privacy of the home. By the time of Charles II, there developed the widespread use of general warrants, first sanctioned by statute but later issued under the King's inherent authority, in order to find evidence among the papers of suspects accused of seditious libel and similar crimes. Unlike the stolen goods warrants, these warrants were issued by the executive rather than the courts, and they authorized, without specificity or a showing of probable cause, the arrest of any person and the search of any dwelling for evidence. Lasson, *supra,* at 37, 42; Fraenkel, *Concerning Searches and Seizures,* 34 Harv. L. Rev. 361, 362-363 (1921).

The validity of these general warrants went virtually unquestioned until 1762, when John Wilkes, a member of Parliament, began publication of a series of anonymous pamphlets known as *The North Briton,* which attacked the ministers as "tools of despotism and corruption" and were

critical of the policies of the government.[4] After the publication on April 23, 1763, of *The North Briton,* No. 45, which accused the King, among others, of dishonestly and dishonorably negotiating a peace treaty with France, Lord Halifax, the Secretary of State, issued a general warrant to four messengers, ordering them "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers." Lasson, *supra,* at 43. The messengers proceeded to arrest and imprison some 50 suspects in three days and to seize large quantities of their private papers. Among those arrested was Wilkes, whose protests against the legality of the general warrants became a national issue (*id.* at 43-44).

On Wilkes' urging, several printers who had been arrested and whose homes had been ransacked brought suit against the messengers for trespass, assault and false imprisonment. Although the messengers defended by relying upon the Halifax warrant, Chief Justice Pratt declared the warrant to be illegal and upheld the verdict of £ 300, stating that "[t]o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject." *Huckle* v. *Money,* 2 Wils. K.B. 206, 207, 95 Eng. Rep. 768, 769. Wilkes then sued Robert Wood, an aide to Lord Halifax who had supervised the execution of the warrant, and he obtained a similar heavy verdict. *Wilkes* v. *Wood,* 19 How. St. Tr. 1153, 98 Eng. Rep. 489. The messengers ap-

[4] See generally 3 Churchill, *A History of the English-Speaking Peoples—The Age of Revolution* 165-169 (1957).

pealed, but the judgments were affirmed. *Leach* v. *Money*, 19 How. St. Tr. 1001, 97 Eng. Rep. 1075.

At approximately the same time, another, more celebrated, attack on the use of general warrants occurred. In November 1762 Lord Halifax had issued a warrant for the arrest and seizure of the books and papers of John Entick, "the author, or one concerned in the writing of several weekly very seditious papers, entitled 'The Monitor or British Freeholder * * *'." *Entick* v. *Carrington, supra,* 19 How. St. Tr. at 1031. After Entick was arrested, his house thoroughly searched, and his personal papers seized, he sued the messengers in trespass and recovered £ 300. The Court of Common Pleas, sitting *en banc,* upheld the verdict in an opinion "welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country" (*Boyd* v. *United States,* 116 U.S. 616, 626). Chief Justice Camden proclaimed:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. * * * By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass or even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

Entick v. *Carrington, supra,* 19 How. St. Tr. at 1066.

After surveying the precedents, Lord Camden could find no justification for the general warrants. In particular, they were not like the warrants issued to search for stolen goods (*id.* at 1067):

> Observe too the caution with which the law proceeds in this singular case. —There must be a full charge upon oath of a theft committed. —The owner must swear that the goods are lodged in such a place. —He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description. —And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.
>
> On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove in the owner's behalf the officer's misbehavior. —To say the truth, he cannot easily misbehave, unless he pilfers; for he cannot take more than all.
>
> If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject, by adding proper checks; would require proofs beforehand; would call upon the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy: my answer is, that all of these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.

Within two years, in April 1766, the House of Commons resolved that the seizure of papers in cases of libel was illegal and that general warrants were universally illegal except in cases provided for by act of Parliament. 19 How. St. Tr. at 1074-1075.

Evidence of the dangers of the general warrant was not limited to one side of the Atlantic. Also fresh in the minds of those who drafted the Constitution were the writs of assistance, which were general search warrants authorizing customs officials in the Colonies to enter anywhere during daylight hours to search for smuggled goods. See *Stanford* v. *Texas*, 379 U.S. 476, 481-484. The writs were in many ways more objectionable than the general warrants, since, unlike the warrants, which were directed toward a particular case of libel, the writs were "not returnable at all after execution, but [were] good as a continuous license and authority during the whole lifetime of the reigning sovereign." Lasson, *supra*, at 54. See also Landynski, *supra*, at 30-31.

The death of George II in October 1760 and the resulting expiration of the outstanding writs six months later led the merchants of Boston to petition the courts that the writs not be renewed. The merchants were represented in their cause by James Otis, Jr., whose oration before the Superior Court of Massachusetts electrified the colonists (2 *Legal Papers of John Adams* 142-144 (Wroth and Zobel ed. 1965)):

> Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry

> —their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. • • • Again these writs ARE NOT RETURNED. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in the law live forever, no one can be called to account. Thus reason and the constitution are both against this writ.

Although Otis' words were persuasive, the Crown's power to issue the writs was eventually upheld, and subsequent acts of Parliament clearly signaled the intention that they be enforced. See Landynski, *Search and Seizure and the Supreme Court* 33-36 (1966); Lasson, *supra*, at 62-66.

Two conclusions important to a consideration of the proper role of search warrants under the Fourth Amendment are apparent from this brief historical discussion. One is that the colonists' chief, if not exclusive, concern with unreasonable searches and seizures was directed toward unjustified intrusions into the home. It was against the background of a history of lawless entry into a man's home under the guise of authority, followed by wholesale search through his papers and possessions, that the Fourth Amendment was adopted. The right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" in essence entailed for the Framers "the right to shut the door on officials of the state unless their entry is under proper authority of law." *Frank* v. *Maryland*, 359 U.S. 360, 365.[5] The home was

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[5] "Indisputably the 'searches and seizures' on the agenda at the time the fourth amendment was written were the rummagings of the English messengers and colonial customs officers. We can reconstruct with some fair confidence what 'the

the area in which the greatest expectation of privacy was placed and over which the great battles of Wilkes, Entick, and Otis, involving the general warrants and the writs of assistance, had been fought. Indeed, it is fair to say that the historical record reflects no similar concern by the colonists and their British contemporaries at the spectre of an unjustified search or seizure of chattels that had voluntarily been removed from the dwelling. Taylor, *Two Studies in Constitutional Interpretation* 39, 43 (1969).

The second, related conclusion to be drawn from the historical record is that "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants." Taylor, *supra*, at 41. As Professor Taylor has observed (*ibid.*):

> It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods—an interesting use of a practice already obsolescent to limit and mitigate a current and dangerous practice.

framers' thought of those. It is illusory to suppose that we can know what they thought of anything else. Nothing else was then in controversy." Amsterdam, *Perspectives On The Fourth Amendment*, 58 Minn. L. Rev. 349, 398 (1974). See also Fraenkel, *supra*, 34 Harv. L. Rev. at 365 ("It is, therefore, apparent that the Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won, that finds another expression in the maxim 'every man's home is his castle.'").

Nothing in the pertinent history suggests that the Framers were troubled by warrantless searches outside the home or that the Fourth Amendment was intended to upset the settled practice allowing such searches if supported by probable cause.[6] Searches outside the privacy of the home, after all, "involved none of the abuses against which Otis and Camden railed. The only victims of such searches were those who, as probable felons, were the objects of hue and cry, hot pursuit, or an arrest warrant," and it was accepted that "their persons [should] be subject to search for the fruits of their crimes, or the weapons, clothes, or other objects that might identify them as felons * * *. Here was no threat to the honest householder, no fear of arrogant 'messengers' breaking open desks or trunks to search for smuggled jewels or libellous documents. What need for a warrant to justify a search that was so natural a concomitant of apprehending and convicting a dangerous cutthroat?" Taylor, *supra*, at 39.

2. *Evidence of events contemporaneous with the adoption of the Constitution indicates that the Framers were concerned with general warrants rather than warrantless searches and did not intend to alter the settled historical distinction between warrantless searches of buildings and of other places*

The Framers' preoccupation with general warrants rather than warrantless searches is borne out by the constitutions adopted by the colonial legislatures after independence was declared. Between 1776 and 1783, at least

[6] Compare *United States* v. *Watson*, 423 U.S. 411 (Fourth Amendment not intended to modify common-law rule permitting warrantless arrests on probable cause in a public place).

eight States—Virginia,[7] Pennsylvania,[8] Delaware,[9] Maryland,[10] North Carolina,[11] Vermont, [12] Massachusetts,[13] and New Hampshire [14]—adopted declarations of rights that included a provision on searches and seizures, and "[i]n all of them the warrant is treated as an enemy, not a friend." Taylor, *supra*, at 41. See also *Henry* v. *United States*, 361 U.S. 98, 100-101; Lasson, *supra*, at 79-82. While many of these early constitutions also stated the broader principle of freedom from unreasonable searches and seizures, the wording of these provisions "seems to show that the general principle was stated merely as a basis for the minor premise condemning general warrants and that the abuse attempted to be prevented was that of general warrants only." Lasson, *supra*, at 81, n. 10.

This historical concern is further confirmed by the "legislative history" of the Fourth Amendment itself. In proposing the adoption of that provision, James Madison's statement to the House of Representatives directed its attention

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[7] Virginia Declaration of Rights, Art. 10 (1776), *reprinted in* 1 Schwartz, *The Bill Of Rights: A Documentary History* 235 (1971) (hereinafter cited as "Schwartz").

[8] Pennsylvania Declaration of Rights, Art. X (1776) (Schwartz 265).

[9] Delaware Declaration of Rights, § 17 (1776) (Schwartz 278).

[10] Maryland Declaration of Rights, Art. XXIII (1776) (Schwartz 282).

[11] North Carolina Declaration of Rights, Art. XI (1776) (Schwartz 287).

[12] Vermont Declaration of Rights, Art. XI (1777) (Schwartz 323).

[13] Massachusetts Declaration of Rights, Pt. I, Art. XIV (1780) (Schwartz 342).

[14] New Hampshire Bill of Rights, Art. XIX (1783) (Schwartz 377-378).

solely to the problem of general warrants (1 Annals of Congress 438 (1789)):

> The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.[15]

Accordingly, the original draft of the Fourth Amendment, as revised in minor, stylistic particulars by the Committee of Eleven, reflected the understanding that it was to be aimed specifically and solely against the use of certain sorts of warrants. It provided (1 Cong. Deb. 783 (Gales and Seaton ed. 1834)):

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

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[15] In a letter to George Eve a few months earlier, Madison had written (1 *Letters and Other Writings of James Madison* 447 (1865)):

> [I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, &c.

An amendment was then proposed by Representative Benson of New York (*ibid.*):

> Mr. Benson objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "and no warrant shall issue."
>
> The question was put on this motion, and lost by a considerable majority.

As described by Lasson, *supra,* at 101-102, however, the Benson version was eventually adopted, it seems, by oversight (footnotes omitted; emphasis in original):

> [O]n August 24, when Benson as chairman of a Committee of Three, which had been appointed to arrange the amendments, reported an arrangement of the amendments as they were supposed to have been agreed upon by the House, the *clause appeared as he had proposed it and as the House had rejected it.*
>
> And so it stands today. The records do not show that the alteration was ever noticed or assented to as such by the House. In this form it was received and agreed to by the Senate. And the only remaining discussion by the House and Senate concerned those amendments upon which the two houses were not in accord.

See also Fraenkel, *supra,* 34 Harv. L. Rev. at 366, n. 30; Landynski, *supra,* at 41-42.

The language of the Fourth Amendment as eventually ratified plainly affords protection against both unreasonable searches and seizures *and* general or otherwise defective warrants. But this background strongly suggests that the Framers intended no change in the then-settled rule that not every warrantless search was *per se* unreasonable. Although the Framers had focused their attention on the

search of the home and had assumed that an intrusion into that area would not be lawful except if undertaken pursuant to a warrant meeting the constitutional requirements, there is no hint in the historical materials that other warrantless searches were considered equally repugnant or were to be measured by the same exacting standard. Indeed, as we develop below, see pp. 41-43, *infra,* quite the contrary may be inferred from legislation enacted by the very Congress that drafted the Bill of Rights, and by other early Congresses, which countenanced warrantless searches outside the sanctity of the dwelling.

3. *This Court has repeatedly acknowledged the distinction between warrantless searches of the home and of areas of lesser expectation of privacy*

Our contention that a warrant is an essential ingredient of reasonableness under the Fourth Amendment only when the conduct of law enforcement officers touches on interests that implicate "the essential purpose of the Fourth Amendment" (*Jones* v. *United States,* 357 U.S. 493, 498) is one that finds substantial support in the decisions of this Court. Although the Court has cautioned that "the Fourth Amendment protects people, not places" (*Katz* v. *United States, supra,* 389 U.S. at 351), it has always recognized that some places are more personal—are more directly linked to the need for individual privacy—and hence more deserving of Fourth Amendment protection than are others.

The home more than any other place satisfies the individual's need for a sanctuary from which the public eye and, insofar as reasonable, the public authority can be excluded except under the most compelling justifications and safeguards. This is not only because as a historical matter, as noted above, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" (*United States* v. *United States District*

Court, supra, 407 U.S. at 313), but also because "[a]t the very core [of personal privacy] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States,* 365 U.S. 505, 511. It is for this reason that "over the years the Court consistently has been the most protective of the privacy of the dwelling" (*Wyman* v. *James,* 400 U.S. 309, 316) and has afforded "the sanctity of private dwellings • • • the most stringent Fourth Amendment protection" (*United States* v. *Martinez-Fuerte,* No. 74-1560, decided July 6, 1976, slip op. 17-18).

In addition to the home and other structures such as an office [16] or hotel room,[17] private communications have received maximum protection from governmental search or seizure. Again, this determination has rested both on the historical underpinnings of the Fourth Amendment—"[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression" (*Marcus* v. *Search Warrant,* 367 U.S. 717, 729)—and on the practical realization of the considerable expectation of privacy placed on conversations held in private and the intrinsic societal importance of satisfying that expectation. See, *e.g., United States* v. *United States District Court, supra; Katz* v. *United States, supra; Berger* v. *New York,* 388 U.S. 41.[18] Similarly, and for even more

[16] *G. M. Leasing Corp.* v. *United States,* No. 75-235, decided January 12, 1977; *Mancusi* v. *DeForte,* 392 U.S. 364; *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385.

[17] *Stoner* v. *California,* 376 U.S. 483; *United States* v. *Jeffers,* 342 U.S. 48; *Johnson* v. *United States,* 333 U.S. 10.

[18] Because there is "no difference [in the expectation of privacy] between the sealed letter and the private telephone message" (*Olmstead* v. *United States,* 277 U.S. 438, 475; Brandeis, J., dissenting), the protections accorded private communications do not diminish when the communication is in a sealed container away from a person's premises. Thus, first-class domestic letters receive the same Fourth Amendment safeguards "as if they were retained by the parties forwarding them in their own domiciles." *Ex parte Jackson,* 96 U.S. 727, 733. See *United States* v. *Van Leeuwen,* 397 U.S. 249.

obvious reasons, intrusions into a person's body (except, perhaps, at the border) have required both probable cause and, in the absence of exigent circumstances, a warrant. See *Schmerber* v. *California,* 384 U.S. 757, 770.

An appreciation of the unique position occupied by the home and these other high privacy areas explains the Court's consistent application of the accepted rule that "a search of private houses is presumptively unreasonable if conducted without a warrant" (*See* v. *City of Seattle,* 387 U.S. 541, 543), subject only to "'a few specifically established • • • situations' [in which] a warrantless search of a dwelling [may] withstand constitutional scrutiny." *Vale* v. *Louisiana,* 399 U.S. 30, 34. Because of the substantial privacy invasion inevitably occasioned by such searches, it is reasonable to insist both that the justification for the intrusion be strong—*i.e.,* that there be probable cause to believe that the object to be seized will be found in the area to be searched—and that the probable cause determination be made in advance by a neutral and detached magistrate.

Advance judicial approval in these contexts makes a significant contribution to the values protected by the Fourth Amendment. Not only does resort to a warrant ensure that unjustified searches and seizures—with their consequent impairment of "core" privacy expectations—will not occur, but it also limits the scope of the officer's discretion by "particularly describing the place to be

searched, and the persons or things to be seized." As the Court observed in *Camara* v. *Municipal Court*, 387 U.S. 523, 532:

> [W]hen [an] inspector [without a warrant] demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.

A warrant provides assurance to the occupant of a home on each of these scores. See *G. M. Leasing Corp.* v. *United States*, No. 75-235, decided January 12, 1977, slip op. 18; *United States* v. *Martinez-Fuerte*, *supra*, slip op. 21. By the same token, in the interception of wire or oral communications, another context in which the warrant requirement is unequivocally imposed, the possibility of "rummaging" by law enforcement officers is equally real and the benefits to the individual from an officer's resort to a warrant equally substantial. Cf. 18 U.S.C. 2518(4) and (5).

In these high privacy areas, then, prior resort to a magistrate has an important role to play, and it is constitutionally unreasonable for law enforcement officers to search and seize without a warrant if one could have been obtained. We recognize, however, that on several occasions the Court has articulated the constitutional preference for a warrant and the presumptive unreasonableness of a warrantless search in broader terms. In *Katz* v. *United States*, *supra*, 389 U.S. at 357, for example, the Court stated:

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello* v. *United States*, 269 U.S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . ." *Wong Sun* v. *United States*, 371 U.S. 471, 481-482. "Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. [Footnotes omitted.]

Despite this unqualified statement, the Court to our knowledge has never invalidated a search, based upon probable cause and otherwise reasonable, because it was undertaken without a warrant, except in an area of "core" privacy such as the dwelling or private communication.[19]

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[19] The cases cited in support of the *per se* rule in *Katz* (389 U.S. at 357, n. 18) were (1) *Jones* v. *United States*, *supra*, 357 U.S. at 498, which held that if "federal officers [were] free to search without a warrant merely upon probable cause to believe that certain articles were *within a home*, the provisions of the Fourth Amendment would become empty phrases" (emphasis added); (2) *Chapman* v. *United States*, 365 U.S. 610, which held that a landlord could not authorize the warrantless entry into the *apartment* of his tenant; (3) *Stoner* v. *California*, *supra*, 376 U.S. at 490, which held that "[n]o less than a tenant of a house, or occupant of a room in a boarding house * * *, a guest in a hotel room is entitled to [the] * * * protection against unreasonable searches and seizures." A fourth case, *Rios* v. *United States*, 364 U.S. 253, involved a search and seizure of narcotics from a defendant who had been riding in a taxicab, where there was neither a warrant *nor* any showing of probable cause to justify the entry into the vehicle. *Id.* at 261.

The Court's other recent expressions of this rule have included (a) the plurality opinion in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 454-455, which relied on *Katz* v. *United States*, *supra* (private communication); *Jones* v. *United States*, *supra* (home); *McDonald* v. *United States*, 335 U.S. 451 (rooming house); and *United States* v. *Jeffers*, *supra* (hotel room); (b) *Cady* v. *Dombrowski*, 413 U.S. 433, 439, which

Indeed, in the one area of lesser privacy expectations that has precipitated the most abundant Fourth Amendment litigation—the search of automobiles and other movable vehicles—the Court has expressly declined to equate the reasonableness of a search with the opportunity to

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relied on *Camara* v. *Municipal Court, supra* (apartment) and *Coolidge* v. *New Hampshire, supra*; and (c) *G. M. Leasing Corp.* v. *United States, supra*, slip op. 13-14, which involved a warrantless search of business premises and relied on *Camara* v. *Municipal Court, supra; Coolidge* v. *New Hamphire, supra; Stoner* v. *California, supra; United States* v. *Jeffers, supra; McDonald* v. *United States, supra;* and *Agnello* v. *United States*, 269 U.S. 20 (home).

Although *Coolidge* may be read as having extended the *per se* rule to the search of a chattel (*i.e.*, an automobile), the emphasis in *Coolidge* was upon the fact that the automobile was parked adjacent to the defendant's home and could only be seized by "entering [his] private property" (403 U.S. at 463, n. 20). Part II-D of the opinion in *Coolidge*—the only relevant portion of the opinion that commanded a majority of the Court—is based on "[t]he most common situation in which Fourth Amendment issues have arisen," namely, those "in which the police enter the suspect's *premises*, arrest him, and then carry out a warrantless search and seizure of evidence" (*id.* at 475; emphasis added). The thrust of that part of the opinion is devoted to answering the argument "that warrantless entry [onto a person's premises] for purposes of arrest and warrantless seizure and search of automobiles are *per se* reasonable, so long as the police have probable cause" (*id.* at 479). See also *id.* at 480. Mr. Justice Harlan, who cast the deciding vote in *Coolidge*, likewise viewed the case as involving "such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of [an offense]" (*id.* at 490), and the same emphasis on the entry onto the defendant's premises is also to be found in that portion of the opinion that did not command a majority of the Court. See, *e.g.*, *id.* at 461, n. 18.

Subsequent cases have expressly distinguished *Coolidge* on the ground that the search and seizure in that case was of an automobile "parked adjacent to the dwelling place of the owner" (*Cady* v. *Dombrowski, supra*, 413 U.S. at 446-447) and that "the seizure of that automobile required an entry upon private property." *Cardwell* v. *Lewis*, 417 U.S. 583, 593.

obtain a warrant.[20] Ever since Chief Justice Taft, writing for the Court in *Carroll* v. *United States*, 267 U.S. 132, 149, stated "the true rule [to be] that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid," the Court has consistently upheld the constitutionality of a probable cause search of a vehicle seized in a public place.[21]

The rationale for the Court's disparate treatment of automobiles and houses does not rest exclusively on the fact that vehicles are mobile and dwellings are not. While this factor may frequently excuse the warrantless *seizure* of a car under the "emergency" exception to the warrant requirement, it is analytically an insufficient justification for the subsequent *search* of the car without prior judicial approval.[22] The answer that the Court has provided why "warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would

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[20] Motor vehicles are "effects" within the meaning of the Fourth Amendment. *Cady* v. *Dombrowski, supra*, 413 U.S. at 439.

[21] See, *e.g.*, *Husty* v. *United States*, 282 U.S. 694; *Scher* v. *United States*, 305 U.S. 251; *Brinegar* v. *United States*, 338 U.S. 160; *Chambers* v. *Maroney*, 399 U.S. 42; *Cady* v. *Dombrowski, supra*; *Cardwell* v. *Lewis, supra*; *Texas* v. *White*, 423 U.S. 67.

[22] The Court has recognized this. "Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former * * *, warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed was remote, if not non-existent." *Cady* v. *Dombrowski, supra*, 413 U.S. at 441-442.

not" is "because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *South Dakota* v. *Opperman, supra,* slip op. 3.[23] "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Cardwell* v. *Lewis, supra,* 417 U.S. at 590.

In *Chambers* v. *Maroney, supra,* for example, the police acquired probable cause to believe that persons driving a particular car had robbed a service station. They spotted and stopped the car, arrested its occupants, and drove the car to the station house, where they thoroughly searched it and found handguns and other evidence of the robbery. The Court upheld the warrantless search of the car even though, once the car had been seized, there were no exigent circumstances precluding the procurement of a warrant prior to the search. Citing the line of cases beginning with *Carroll* v. *United States, supra,* the Court began by stating that "[i]n terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office" (399 U.S. at 48) and that "automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize" (*ibid.*). The Court then considered whether a distinction should be drawn between the warrantless seizure of the automobile and the ensuing warrantless search (*id.* at 51-52):

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained;

[23] See also *United States* v. *Martinez-Fuerte, supra,* slip op. 17-18; *United States* v. *Ortiz,* 422 U.S. 891, 896, n. 2.

> arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

The Court warned, however, that the "same consequences may not follow where there is unforeseeable cause to search a house" because "as *Carroll, supra,* held, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars" (*id.* at 52).

4. *For purposes of the warrant requirement, there is no persuasive reason to distinguish between automobiles and other movable chattels that have been validly seized in public*

The same "constitutional difference" between houses and cars, resting as it does on the significantly disparate expectations of privacy in these areas, applies as well between houses and chattels other than automobiles. One's reasonable expectation of privacy in baggage such as the footlocker in this case is not appreciably greater than that in a vehicle. Footlockers and other baggage carry only a fraction of a person's possessions and rarely contain personal papers. Indeed, there is virtually no meaningful distinction between such containers and the enclosed areas of an automobile, such as a glove compartment or a trunk, which frequently serve as the temporary repository of personal effects but which may nonetheless be searched without a warrant after they have been lawfully seized, if probable

cause exists. See, *e.g.*, *Texas* v. *White*, 423 U.S. 67, 68 (front seat console);[24] *Cady* v. *Dombrowski*, 413 U.S. 433, 437 (locked trunk); *Scher* v. *United States*, 305 U.S. 251, 253 (locked trunk); *Chambers* v. *Maroney*, *supra*, 399 U.S. at 44 (glove compartment). Moreover, a footlocker, unlike an automobile, is arguably less deserving of privacy protection, since, as here, possession is frequently surrendered to a common carrier with the consequent risk that it will be opened. See *United States* v. *Bronstein*, 521 F. 2d 459, 465 (C.A. 2) (Mansfield, J., concurring), certiorari denied, 424 U.S. 918.[25]

Furthermore, objects such as the footlocker are, like vehicles, easily movable, so that their warrantless seizure, on probable cause, will almost always be justified. The rationale of the "automobile search" exception, as previously noted, is that "the intrusion involved in initially seizing a car on the highway and holding it for the short time required to seek a warrant is so substantial as to be constitutionally indistinguishable from the intrusion involved in a search of the vehicle." *Texas* v. *White*, *supra*, 423 U.S. at 71 (Marshall, J., dissenting). The same may be said of the search of a footlocker or suitcase that has been validly seized. Certainly the seizure of the container is a substantial interference with the owner's rights to

[24] The search of the car in *White* occurred after the police had observed the driver "making a hand movement toward the glove compartment, and then toward the seat as though attempting to 'stuff' something between the seats." *White* v. *State*, 521 S.W. 2d 255, 256 (Tex. Ct. Crim. App.). The evidence introduced against the defendant was found "stuffed between the fold-down console and the front seat of the car." *Ibid.*

[25] Indeed, common carriers by tariff often reserve the right to inspect freight that they are given to transport. See, *e.g.*, Uniform Freight Classification 12, I.C.C. 8, Rule 2, § 2 (railroads); National Motor Freight Classification, I.C.C. NMF 100-C, Item No. 360, § 3 (motor carriers).

unfettered possession and use of its contents; yet even under the court of appeals' view he may be denied access to it for as long as the officers need to obtain a warrant (Pet. App. 19a). As in *Chambers*, once that intrusion has been sanctioned, calculations of "greater" or "lesser" intrusions will not be demanded; either the immediate search of the chattel or its immobilization until a warrant can be obtained is reasonable under the Fourth Amendment.[26] See also *United States* v. *Edwards*, *supra*, 415 U.S. at 805.

The court of appeals conceded that "baggage or goods in transit present some of the same characteristics as automobiles. Unless immobilized, such items may disappear before a warrant is obtained and immobilization (a step which most courts, including ourselves, will permit, given cause), is arguably just as annoying to the owner as a search" (Pet. App. 17a). The court nevertheless refused to follow the reasoning of *Chambers* to its conclusion so as to approve the search of respondents' footlocker as reasonable. It observed that "[b]aggage predated automobiles, yet *Carroll* and its progeny do not mention baggage as a separate category comparable to vehicles" (*ibid.*). And it was concerned that an extension of the *Chambers* rationale to baggage "could have considerable impact, as [the] premises [of that argument] might seem to apply not only to baggage but to mail, express packages, and moving freight of all description" (*id.* at 18a). The court concluded,

[26] It is frequently to the owner's benefit that an immediate search of the chattel occur if law enforcement officers have probable cause to believe it contains contraband or other evidence of a crime. Because probable cause is established when there exists a reasonable and supportable suspicion of crime that may fall far short of certainty, often there will be probable cause to search containers carrying nothing incriminating. A warrantless search at the moment of seizure may vindicate the owner and avoid unnecessary disruption of his activities.

in short, that there is a difference of constitutional dimensions between the search of one type of movable container that has been validly seized in public upon probable cause (an automobile) and the search of another (baggage or packages).

In our view, neither history nor logic supports such a distinction. To begin with, it is not remarkable that *Carroll* and subsequent cases[27] "do not mention baggage as a separate category comparable to vehicles." Since each of those decisions involved the search of a motor vehicle, the Court had no occasion to discuss the search of baggage independent of the automobile.[28] But at the same time the Court's discussion in *Carroll* implicitly affords strong support for the contention that its reasoning is not limited to vehicles.

The decision in *Carroll* was predicated upon a lengthy review of congressional statutes and court decisions interpreting them, which indicated that, "practically since the

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[27] See n. 21, *supra*.

[28] The lower courts, however, have repeatedly upheld the authority of police to open a footlocker or other container removed from an automobile that had been seized on probable cause. See *e.g.*, *United States* v. *Soriano*, 497 F. 2d 147 (C.A. 5) (*en banc*), pending on petition for a writ of certiorari, No. 76-5143; *United States* v. *Issod*, 508 F. 2d 990 (C.A. 7), certiorari denied, 421 U.S. 916; *United States* v. *Evans*, 481 F. 2d 990 (C.A. 9). Indeed, the court below apparently would have upheld the search here under the "automobile exception" if the agents had waited to make the arrests until after respondents had placed the trunk into the automobile and had started the motor. "Under the circumstances" of the case, however, the court of appeals felt compelled to agree with the district court that "the floor of the automobile was nothing more than a platform or resting place for the footlocker" (Pet. App. 10a, 48a). For purposes of rational Fourth Amendment analysis, we can see no constitutional difference between the validity of a search of a footlocker taken from an automobile and of one lawfully seized on a public street.

beginning of the Government," there has been recognized "a necessary difference" (267 U.S. at 153) between the search of houses and similar structures and the search of "goods in the course of transportation" (*id.* at 149-151):

> It is noteworthy that the twenty-fourth section of the Act of 1789 [1 Stat. 29, 43] provides:
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> "That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall haye cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."
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> Again, by the second session of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officials not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been unlawfully brought into the

country, to seize and secure the same, and the vehicle or beast as well, for trial and for forfeiture.[29]

See also Lasson, *supra,* at 125. As the Court noted in *Carroll* (267 U.S. at 152), this Act expired after two years but was later revived and reenacted as Section 3 of the Act of July 18, 1866, 14 Stat. 178, which provided in part:

> That any of [certain authorized officers or other persons] may stop, search, and examine, • • • any vehicle, beast, or person on which or whom he or they shall suspect there are goods, wares, or merchandise which are subject to duty or shall have been introduced into the United States in any manner contrary to law, • • • and to search *any trunk or envelope,* wherever found, in which he may have a reasonable cause to suspect there are goods which were imported contrary to law; and if any such officer or other person so authorized as aforesaid shall find any goods, wares, or merchandise, on or about any such vehicle, beast, or person, *or in any such trunk or envelope,* which he shall have reasonable cause to believe are subject to duty, or to have been unlawfully introduced into the United States, • • • he shall seize and secure the same for trial • • • [Emphasis added.][30]

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[29] Morover, the Act of March 3, 1815, 3 Stat. 232, contained the following proviso in Section 2:

> *Provided always,* That the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation or *to packages* on any animal or animals, or carried by man on foot. [Emphasis added.]

The President who signed the 1815 statute into law was, of course, James Madison, who had proposed the language that eventually became the Fourth Amendment. Lasson, *supra,* at 100.

[30] This section, which later became Rev. Stat. § 3061, is now 19 U.S.C. 482.

The significance of these statutes is readily apparent. The First Congress, many of whose members had only a few years earlier railed against the "hated writs of assistance," which "had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws" (*Stanford* v. *Texas, supra,* 379 U.S. at 481), nevertheless clearly authorized American officials to seize and search uncustomed goods on reason to suspect their existence; only when the search and seizure occurred in a "dwelling-house, store, building, or other place" out of the public view was a warrant required. And of equal importance is the fact that the statutes relied on in *Carroll* as having recognized a "constitutional difference between houses and cars" (*Chambers* v. *Maroney, supra,* 399 U.S. at 52) dealt in precisely the same fashion with other movable containers or packages. Each could contain articles that the police were entitled to seize, and each was potentially removable from police control before a warrant could be obtained; therefore, so long as the officers had sufficient justification for the intrusion, each was subject to search without a warrant. As the Court has since observed, "[c]ommon sense dictates • • • that questions involving searches of motorcars *or other things readily moved* cannot be treated as identical to questions arising out of searches of fixed structures like houses." *Preston* v. *United States,* 376 U.S. 364, 366 (emphasis added).

Nor is there substance to the First Circuit's objection that to permit a warrantless search of baggage such as a footlocker upon probable cause would inevitably lead to similar searches of "mail, express packages, and moving freight of all description" (Pet. App. 18a). We have already noted (see p. 30 and note 18, *supra*) that both historical considerations related to a central purpose underlying the adoption of the Fourth Amendment—the protection of a

person's papers from indiscriminate searches—and the strong expectation of privacy in private communications justify a presumptive warrant requirement before domestic first-class mail may be opened.[31] The rule that we urge for baggage and other movable containers not possessing such high-privacy characteristics would not affect that requirement. As to "express packages, and moving freight of all description," it is difficult to understand why a rule permitting the probable cause search of baggage lawfully seized in a public place is made less reasonable because it arguably would allow the search of these other, similar types of containers. Indeed, a substantial portion of the "freight" that law enforcement officers encounter in transit deserves less stringent Fourth Amendment protection than baggage, since the owner's privacy interest in such goods (which he may never have seen) is generally considerably subordinate to his proprietary interest in them—his concern that they arrive safely—and he may have described their contents on the outside of the package both as an advertisement and as an aid in ensuring their proper handling.

Finally, the warrantless, probable cause search of personal belongings outside the home is reasonable because it creates little risk of those abuses that the Warrant Clause was designed to prevent. Of prime importance is the fact that each such search must be justified by facts sufficient to warrant a man of prudence and caution to believe that the chattel contains contraband or the instrumentalities or evidence of a criminal offense. This is a stringent require-

[31] Domestic first-class mail also has statutory protection from search without a warrant. 39 U.S.C. 3623(d). The amenability of international mail to warrantless search at the border stands on a different historical and legal footing, the precise contours of which are presently before the Court in *United States* v. *Ramsey*, No. 76-167, certiorari granted, October 4, 1976.

ment and one whose satisfaction the officer may eventually have to demonstrate in court.[32] Moreover, there is little opportunity in such searches for the type of wide-ranging, indiscriminate rummaging through possessions that a search of a house or office or of communications may entail and that the warrant historically was designed to prevent. See *Marron* v. *United States*, 275 U.S. 192, 196. The scope of the search is necessarily limited by the size and contours of a relatively small container and by the number of items that can be enclosed therein. A person can exercise substantial control over both the kinds of belongings that he subjects to search in public and the frequency with which the police will encounter them; a dwelling, on the other hand, is always subject to search (within reasonable time limits) when the police have reason to believe that it harbors criminal activity or evidence. Most importantly, perhaps, a search of chattels outside the home may only occur after the police have properly seized them without a warrant and denied the owner access to them—a risk that a person necessarily accepts when he transports the chattel in public and that further diminishes his reasonable expectation of privacy.

In sum, if this case involved the warrantless search of an automobile that had been lawfully seized in South Station on probable cause to believe that it contained a controlled substance, the outcome would not be in doubt. We

[32] Evidence seized on less than probable cause will be excluded at trial, and a police officer's determination of probable cause is scrutinized with greater care when a warrant has not been obtained. *United States* v. *Watson*, *supra*, 423 U.S. at 423; *United States* v. *Ventresca*, 380 U.S. 102, 106; *Aguilar* v. *Texas*, 378 U.S. 108, 111. Even if no incriminating evidence is found, an officer who acts without probable cause may be forced to answer in damages. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388; *Monroe* v. *Pape*, 365 U.S. 167.

submit that no different result is required because the agents searched a footlocker rather than a vehicle. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears" (*Coolidge* v. *New Hampshire, supra,* 403 U.S. at 461-462), and the Court's decisions upholding warrantless automobile searches have therefore been grounded in broader principles that are equally applicable here.

B. Even if the Court were to adopt a presumptive rule in favor of warrants, the search of the footlocker was reasonable

Our discussion thus far has sought to demonstrate that the search of a footlocker that has been lawfully seized in a public place upon probable cause to believe that it contains evidence of a crime is not unreasonable under the Fourth Amendment simply because accomplished in the absence of a warrant. Application of this principle would require a reversal of the court of appeals' judgment, since both lower courts found (Pet. App. 8a, 45a), and respondents have never seriously contested, that the agents had probable cause to believe that the footlocker contained marijuana and that the agents could therefore properly immobilize it until a search could take place. But regardless of whether the Court adopts this contention, two additional factors present in this case contribute to the lawfulness of the warrantless search of the footlocker: the agents' belief that the footlocker contained contraband, and respondents' arrests at the time of the seizure.

1. ***The agents could lawfully seize and search the footlocker without a warrant on probable cause to believe that it contained contraband***

The agents had probable cause to believe that the footlocker contained not personal belongings or papers, but contraband.[33] Statutes dating almost from the time of adoption of the Fourth Amendment have authorized warrantless searches of packages for "contraband goods in the course of transportation and subject to forfeiture or destruction." *Carroll* v. *United States, supra,* 267 U.S. at 149. Contraband is material whose very possession the law proscribes and to whose possession "the government is entitled * * *." *Id.* at 149, quoting from *Boyd* v. *United States, supra,* 116 U.S. at 623.

In relying upon the fact that the footlocker contained contraband, we are not attempting to resurrect the distinction between such items and "mere evidence," a distinction that was put to rest by *Warden* v. *Hayden,* 387 U.S. 294. The Fourth Amendment does not turn upon whether the government has a stronger property interest in the seized goods than does the person claiming to be aggrieved by the seizure. *Id.* at 307. But the reasonableness requirement of the Fourth Amendment does depend upon the strength of a person's privacy interest in the area invaded by the search, and it is significant that a person can have no reasonable expectation of privacy in contraband goods. Indeed, in assessing the reasonableness of the warrantless search in *Coolidge* v. *New Hampshire, supra,* the plurality

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[33] The agents could reasonably have believed that the footlocker contained nothing but contraband. Not only was the trunk of an unusual weight for its size, but also a dog trained to detect controlled substances had reacted positively to the footlocker and the footlocker was leaking talcum powder, which is commonly used to conceal the odor of such substances. It is unlikely that one would pack a large quantity of loose talcum powder in a container carrying personal effects. Respondents also had several suitcases in their possession, which was a further clue that the footlocker did not carry personal effects.

opinion several times emphasized that the object of the search was not "contraband or stolen goods." 403 U.S. at 472. See also *id.* at 462.

Moreover, since the presence of the contraband subjected the footlocker to a warrantless seizure and forfeiture, it was reasonable for the agents to conduct a search of the chattel in their lawful possession. In *Cooper* v. *California,* 386 U.S. 58, state police arrested the defendant in connection with a narcotics offense and impounded the automobile he was driving, pursuant to a state statute requiring the seizure of any "vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics, such vehicle 'to be *held as evidence* until a forfeiture has been declared or a release ordered'" (*id.* at 60). One week later police officers searched the car without a warrant and found incriminating evidence in the glove compartment. In affirming the defendant's conviction despite the use of the evidence at trial, the Court held that the search had been reasonable (*id.* at 61):

> Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had "legal title" to it or not—was closely related to the reason petitioner was arrested, the reason his car was impounded, and the reason it was being retained.

Here, too, the seizure of the footlocker was pursuant to a statute that required its forfeiture. 21 U.S.C. 881 represents the judgment by Congress that not only automobiles and other conveyances (21 U.S.C. 881(a)(4)) but also "container[s]" of all kinds (21 U.S.C. 881(a)(3)) are an indispensable tool of illicit narcotics traffic and are therefore subject to seizure upon probable cause (21 U.S.C. 881 (b)(4)) and forfeiture to the government (21 U.S.C. 881 (b)(3)). The court of appeals agreed that Section 881(b) "reinforces the agents' power to detain baggage at least temporarily" (Pet. App. 19a and n. 9). But if agents may seize such containers and "treat [them] as if [they] were their own" (*Cady* v. *Dombrowski, supra,* 413 U.S. at 453; Brennan, J., dissenting), a search of their contents is reasonable "as an integral part of their right of retention" (*ibid.*). See *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 464, n. 21; *United States* v. *Edwards,* 415 U.S. 800, 807.[34]

2. *A warrant was unnecessary to search the footlocker, since it had been seized on probable cause at the time of and in connection with respondents' arrests*

The seizure of the footlocker occurred contemporaneously with respondents' arrests, and the search took place as soon thereafter as was practicable.[35] In *United States* v. *Watson, supra,* the Court reaffirmed that the police may carry out a warrantless arrest in a public place upon probable cause to believe that a crime has been or is being committed by the person arrested. The Court upheld this authority, sanctioned both by history and the necessities of law enforcement, despite the observation of Mr. Justice

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[34] See also *United States* v. *Zaicek,* 519 F. 2d 412, 414-415 (C.A. 2); *United States* v. *Dinapoli,* 519 F. 2d 104, 106 (C.A. 6); *United States* v. *Francolino,* 367 F. 2d 1013, 1018-1022 (C.A. 2) (Friendly, J.), certiorari denied, 386 U.S. 960.

[35] The footlocker was opened at the federal building within 90 minutes of respondents' arrests. According to the arresting agent, the search was delayed because "there was considerable pedestrian traffic, motor vehicle traffic [at South Station], and it was dark on the street corner—not well lit for purposes of observation, anyway" (A. 50). Ths short delay does not affect the legality of the search. See *United States* v. *Edwards, supra,* 415 U.S. at 803; *Abel* v. *United States,* 362 U.S. 217, 239.

Powell (423 U.S. at 428) that "as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater [than those on the search of private places]. A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent."

Once a valid arrest has occurred, a warrantless search of the arrestee and of his surrounding area, incident to the arrest, has always been regarded as reasonable. Weighed against the "annoyance and temporary inconvenience" of the search is, first of all, the need of the arresting officers to protect themselves against use of any weapon that the arrestee may have in his possession. Equally imperative is the need to secure evidence of his crime that could be destroyed unless immediately discovered. And a quick search of the arrestee and his possessions may disclose leads to the involvement of other persons in the crime—leads that might prove fruitless if the arrestee or others were to alert his confederates while the police obtained a warrant.

While the validity of the search of a person incident to a lawful arrest "has been regarded as settled from its first enunciation" (*United States* v. *Robinson*, 414 U.S. 218, 224),[36] the search of an arrestee's surrounding area "has been subject to differing interpretations as to the extent of the area which may be searched" (*ibid.*). After a series of

[36] "There is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself." Taylor, *supra*, at 28.

often-irreconcilable holdings,[37] the Court concluded in *Chimel* v. *California*, 395 U.S. 752, that a warrantless search incident to an arrest was reasonable only if confined to "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

Although the court of appeals recognized the need to permit the agents to conduct a thorough search of respondents and their belongings at the time of their arrest, it held that the search of the footlocker could not be justified on that basis because it was not within respondents' "immediate control." This conclusion, we submit, unduly restricts the search incident to arrest exception to the warrant requirement and incorrectly applies the holding of *Chimel* to a type of search that that case, and the decisions that preceded it, did not involve and should not be construed to encompass—namely, a search outside the home or office, where the police have probable cause both to arrest a person *and* to search the property in his possession for evidence of a crime. In such circumstances, the search creates no appreciable risk of the kind of abuse against which *Chimel* was directed. Here, unlike the normal "incidental search," which is justified solely by the fact of arrest, the agents had probable cause to believe that the footlocker contained contraband. In view of this strong, specific justification for the search and the severely weakened privacy interests of the person under arrest, it was reasonable for the agents to

[37] See, *e.g.*, *Marron* v. *United States*, *supra*; *Go-Bart Importing Co.* v. *United States*, *supra*; *United States* v. *Lefkowitz*, 285 U.S. 452; *Harris* v. *United States*, *supra*; *Trupiano* v. *United States*, 334 U.S. 699; *United States* v. *Rabinowitz*, 339 U.S. 56; *Abel* v. *United States*, *supra*; *Ker* v. *California*, 374 U.S. 23.

undertake the search without the additional protections accorded by prior resort to a magistrate.

Chimel arose against the background of what the Court perceived to be an effort by law enforcement officers to use arrests on private property as little more than a pretext for the kind of free-handed and unrestricted search of premises that the Framers had condemned in adopting the Warrant Clause. As Mr. Justice Stewart observed in *Chimel* (395 U.S. at 767), the Court's decisions upholding such searches had given "law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere." This practice, the Court noted, had been correctly characterized by Judge Learned Hand's remark in *United States* v. *Kirschenblatt*, 16 F. 2d 202, 203 (C.A. 2), that "[a]fter arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant * * *." *Chimel* sought to end once and for all such warrantless, unjustified "top-to-bottom search[es] of a man's house" (395 U.S. at 766-767, n. 12).[38]

Thus, *Chimel* condemned searches that bore no intrinsic relationship to the underlying arrest but rather employed the arrest as a means to bypass both the requirement of probable cause and (because a "core" privacy area was

[38] *Chimel* involved a wide-ranging search of each of the rooms of the arrestee's home (395 U.S. at 754). In addition, each of the search incident to arrest cases disapproved or questioned in *Chimel* concerned a search for which a warrant would otherwise have been required. See *Marron* v. *United States*, *supra* (apartment); *Harris* v. *United States*, *supra* (apartment); *United States* v. *Rabinowitz*, *supra* (office).

implicated) the need for a warrant.[39] In such circumstances, because of the minimal justification for the search of the arrestee's surrounding area and the important privacy interests invaded by the intrusion, it was imperative that the scope of the search be limited to the extent "commensurate with the rationale that excepts the search from the warrant requirement." *Cupp* v. *Murphy*, 412 U.S. 291, 295.

These considerations are wholly inapposite here for a number of reasons. Contrary to the court of appeals' assumption (Pet. App. 11a-13a), searches incident to arrest are not merely an exception to the warrant requirement. They are also an exception to the probable cause requirement. Such searches do not depend for their justification upon a police officer's reasonable belief that a particular suspect is carrying a weapon or evidence of the crime for which he has been arrested. Rather, they are sanctioned by the arrest itself. *United States* v. *Robinson*, *supra*, 414 U.S. at 235. This being so, it is reasonable to restrict the scope of such non-probable-cause searches to those areas in which weapons could be procured or evidence could be destroyed if not seized at once—in other words, it is important, as a protection of Fourth Amendment interests, to restrict the search so that it is no wider than its sole articulated justification.

When a search following an arrest is supported by a wholly different justification—probable cause to believe that evidence of a crime will be found—the same restriction

[39] The First Circuit had previously perceived the import of *Chimel* in *United States* v. *DeLeo*, 422 F. 2d 487, 492, certiorari denied, 397 U.S. 1037: "We read *Chimel* as being acutely concerned about the increasing legitimation of wide-ranging warrantless searches of lodgings and buildings based on the fortuity of arrests on the premises * * *."

does not follow. In such circumstances the independent justification prevents searches of areas based entirely on the fortuity of the locus of the arrest and provides a built-in limitation on the places and things that may be searched. There is thus no equally compelling reason to limit the search solely to those areas within the arrestee's immediate control, since the search is designed to uncover evidence that there is a strong reason to believe will be found, not merely to prevent the destruction of evidence that may or may not exist.[40]

Furthermore, as noted above, *Chimel* involved the search

[40] The court of appeals' insistence that belongings be in the "immediate control" of the person arrested, even when probable cause for a search of the baggage exists and the search occurs in a public place thus confuses two distinct sets of Fourth Amendment principles and turns the Amendment's protection on its head. A person is more likely to have personal papers and objects on his person or in a small hand-carried container such as a briefcase, suitcase or handbag than in a footlocker. Yet despite the greater expectation of privacy in the contents of these containers, lower courts, including the First Circuit, have upheld their warrantless search even in circumstances where the arrestee has been handcuffed and the chattel effectively removed from his control. See, *e.g.*, *United States* v. *Schleis*, 543 F. 2d 59 (C.A. 8), pending on petition for a writ of certiorari, No. 76-5722. *United States* v. *Giles*, 536 F. 2d 136 (C.A. 6); *United States* v. *Edmonds*, 535 F. 2d 714 (C.A. 2); *United States* v. *Eatherton*, *supra*; *United States* v. *Battle*, 510 F. 2d 776 (C.A.D.C.); *United States* v. *Ciotti*, 469 F. 2d 1204 (C.A. 3), vacated on other grounds, 414 U.S. 1151; *United States* v. *Mehciz*, 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974. See also *Draper* v. *United States*, *supra*, 358 U.S. 307, 314. There is no reasonable basis for concluding that warrantless searches of this kind are reasonable but that a search of the footlocker is not; such a distinction, to borrow the court of appeals' own words, is a " 'gossamer thin' [one] which arresting officers could find impracticable, if not impossible, to follow" (Pet. App. 15a). See LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,"* 1974 Sup. Ct. Rev. 127, 141.

of a home, for which a warrant has traditionally been required, and the "immediate control" test was expressly designed to prevent rummaging akin to that occurring under a general warrant. Areas in which there is less historical or policy justification for a presumptive warrant requirement, such as the search of an automobile or, we submit, a footlocker validly seized in a public place, stand on an entirely different footing, and there is accordingly more room for a flexible standard in determining whether the search of a surrounding area incident to an arrest is reasonable. Indeed, in the one case that has invalidated an incidental search outside a building, the search was held to be defective because it was "too remote in time or place" from the arrest, rather than because it was too extensive, and the Court expressly acknowledged that "what may be an unreasonable search of a house may be reasonable in the case of a motorcar" and that the extent of a search incident to arrest depends, in part, upon "the place where [the suspect] is arrested." *Preston* v. *United States*, *supra*, 376 U.S. at 366-367.[41] See also *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 220.

Even if a warrant would normally be required to search a footlocker on probable cause, incidental searches following an arrest provide safeguards that justify dispensing with the need for prior resort to a magistrate. Although a return must be made on a search warrant, property seized in a warrantless search not accompanying an arrest is not promptly accounted for to a judicial officer, nor is the pro-

[41] Moreover, as the Court noted in *Chambers* v. *Maroney*, *supra*, 399 U.S. at 47, the defendants in *Preston* had been arrested for vagrancy, and "it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto."

priety of the seizure evaluated in any manner by such an officer, unless and until the person from whom the property is seized moves for suppression or return of the property. When the search follows an arrest, however, "there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search by his very presence at the scene, and having been arrested, he will soon be brought into contact with people who can explain his rights." *Chimel* v. *California, supra,* 395 U.S. at 782-783 (White, J., dissenting).

Finally, a probable cause search of a person's belongings following his arrest in a public place is reasonable, whether or not those belongings may have been within his immediate control, because of the greatly diminished expectation of privacy following an arrest. As Mr. Justice Powell observed in *United States* v. *Robinson, supra,* 414 U.S. at 237-238 (footnote omitted), "a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of an arrest." In *United States* v. *Edwards, supra,* for example, the Court upheld the warrantless, probable cause search and seizure of an arrestee's clothing some 10 hours after his arrest. The Court concluded that the search was justified as incident to the arrest. But it also stressed the fact that the seizure was supported by probable cause, and it quoted with approval from the First Circuit's decision in *United States* v. *DeLeo, supra,* 422 F. 2d at 493, to explain why a warrant was unnecessary in the circumstances:

> While the legal arrest of a person should not destroy the privacy of his premises, it does— for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.

Under the reasoning of *Robinson* and *Edwards,* then, and in light of the specific situation to which *Chimel* was directed, the search of respondents' footlocker without a warrant following their arrest was reasonable. The police had probable cause both to arrest respondents and to search the footlocker, and the reason for the search was "closely related to the reason [respondents were] arrested." [42] There was therefore no danger of the kind of pretextual use of an arrest for an exploratory search that had prompted the limitation imposed by *Chimel.* Moreover, for the short duration following their arrests and the search of the footlocker, respondents' arrests took their "privacy out of the realm of protection from police interest in weapons, means of escape, and evidence," so that the inhibitions upon the search were insufficiently great to require a judicial determination of probable cause in advance. In sum, the agents' conduct satisfied the test of reasonableness under the Fourth Amendment.

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[42] *United States* v. *Edwards, supra,* 415 U.S. at 806, quoting *Cooper* v. *California, supra,* 386 U.S. at 61.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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UNITED STATES OF AMERICA,
PETITIONER,

v.

JOSEPH A. CHADWICK ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1721.

UNITED STATES OF AMERICA,
PETITIONER,

v.

JOSEPH A. CHADWICK ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Respondents.

Question Presented.

Whether the warrant requirement should be abolished for all searches of personal effects outside the home even if the effects are contained in a securely locked, opaque footlocker, "kept private and away from prying eyes," and no exception or exigency compels swift police action?

Statement of the Case.

Prior Proceedings.

Respondents Chadwick, Machado and Leary were arrested on May 10, 1973, and were subsequently charged on November 2, 1973, with possession of marijuana with intent to distribute and conspiracy in violation of 21 U.S.C. §§ 841(a)(1) and 846. Prior to trial, respondents challenged the validity of Chadwick's arrest as lacking in probable cause and moved to suppress the fruits of a warrantless search of certain luggage (a large footlocker and two small suitcases), a body search of Chadwick's person and certain remarks made by Chadwick in the immediate aftermath of his arrest.

After an evidentiary hearing held on September 5, 1974, the district court made findings of fact and rulings favorable to respondents on all issues and suppressed all of the challenged evidence (Pet. App. 32a-51a). The government then moved for reconsideration, and a second evidentiary hearing was held on March 6, 1975. The result of the reconsideration was that the district court amplified its previous rulings and reaffirmed its decision to suppress (*id.*, 52a-63a). The government appealed and on March 29, 1976, the court of appeals rendered a decision upholding the determinations of the district court on all issues (Pet. App. 1a-31a).

On May 26, 1976, the government filed a petition for a writ of certiorari. It limited its petition, however, to only one aspect of the case — the decision to suppress the marijuana seized from the large footlocker — and raised no questions concerning the lower courts' suppression of Chadwick's post-arrest statements and of the marijuana seized from Chadwick's person and from the two small suitcases which were also searched without a warrant. On October 4, 1976, the writ was granted on the single issue raised.

The Evidence With Respect To The Luggage Searches.

Both opinions of the district court (Pet. App. 32a-51a, 52a-63a) and the opinion of the court of appeals (*id.*, 1a-32a) contain extensive summaries of the evidence adduced at the two hearings. The key facts pertinent to the footlocker search are these:

On May 8, 1973, federal narcotics agents in Boston received "reliable information" from their counterparts in San Diego, California, that an Amtrak passenger had loaded a 200-pound footlocker "suspected of containing marijuana" on a train bound for Boston (Pet. App. 34a; see *id.*, 2a). The shipper, Machado, had booked passage for two to Boston (*id.*), and the destination address of the footlocker was his residence in Scituate, Massachusetts, a small town near Boston (A. 15). The tip had come from an Amtrak official who had observed that Machado matched a profile used by the railroad to spot drug traffickers, that the footlocker was leaking talcum powder (a substance commonly used to mask the odor of marijuana (A. 15)), and that the footlocker had an "unusual weight for its size" (Pet. App. 2a-3a, 34a). Along with this information, relatively detailed descriptions of the footlocker and of Machado were relayed to the agents in Boston (Pet. App. 3a, 34a; A. 15, 17).

The train was due to arrive at South Station, Boston, two and a half days later, at 7:50 p.m., May 10th. Between May 8th and May 10th the Boston agents "sought no search or arrest warrants, but continued investigating" (Pet. App. 3a). When the train stopped at New Haven, Connecticut, several hours prior to its Boston arrival, Amtrak officials verified that the footlocker was still aboard, and conveyed this information to the Boston agents (Pet. App. 3a, 34a). The agents determined that "the suspicion was sufficient to justify an expenditure of men and energy at South Station" and accordingly six law enforcement officers, as well as a

"detector dog" trained to "alert" to marijuana and its handler, were gathered at the station an hour before the train's scheduled arrival (Pet. App. 3a).

After the train's hour-late arrival, the agents identified a debarking passenger fitting Machado's description and observed him and his travelling companion (a woman later identified as Leary) "take possession of an old brown footlocker and two suitcases" (Pet. App. 35a). Machado and Leary took the footlocker from the baggage cart which had been used to transport the 200-pound piece of baggage from the train to the station area, "placed it on the floor . . . and sat down on it" (Pet. App. 3a). A few minutes later, the dog was released near the footlocker and "started scratching on it and giving what is considered a response or alert response to the controlled substance" (A. 49). The agents never observed the footlocker open (Pet. App. 3a).

Shortly thereafter, Chadwick arrived and after a brief conversation with Machado and Leary left the terminal and went outside to a parked automobile (Pet. App. 4a). "Machado and Leary engaged a redcap who physically transported the footlocker out to the car" where Chadwick was waiting (Pet. App. 4a). Leary, taking one of the two suitcases with her, entered the front seat of the parked automobile (Pet. App. 4a, 53a). The redcap, with the help of Machado and Chadwick, loaded the footlocker and one of the suitcases into the trunk of the car (Pet. App. 4a, 53a).

Then, "before the trunk lid was closed or the car engine started, the federal agents closed in and arrested the trio" (Pet. App. 5a). Chadwick and Machado were seized near the rear of the automobile, Leary while seated in the front seat (Pet. App. 5a). "There were numerous officers present, including city policemen, railroad guards and federal agents" (Pet. App. 50a). The arresting officers had at least one gun drawn and within "less than 30" seconds (A. 39) the three respondents were "frisked . . . put up against the car" and "handcuffed" (A. 39-40). Chadwick

and Machado were then placed in one government vehicle, Leary in another, and the agents took possession of the automobile and the luggage (Pet. App. 5a). No guns or weapons were found on any of the respondents (Pet. App. 5a); no accomplices were suspected or believed to be in the area (Pet. App. 50a); and immediately after the arrest the keys to the footlocker were taken from Machado's person (*id.*, 5a, 35a-36a, 50a).[1] As the government conceded in testimony, the footlocker was, from the moment of the arrest, under the agents' "control at all times" (*id.*, 5a; see 35a-36a, 50a).

The luggage was taken to the agents' office in the federal building in Boston. The footlocker had a "double locking system" (A. 41) — "a padlock over the regular trunk latch" (*id.*) — and both suitcases were also locked (Pet. App. 7a-8a). According to government testimony, "there was no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates" (A. 44). Nor was there any "suspicion" that the luggage contained explosives (see A. 77). Furthermore, facilities were available at the agents' office in which locked luggage could have been stored securely for a period of time (see *id.*). Against this backdrop, approximately one and a half hours after the arrests, the federal agents — acting without consent and without search warrants — entered the locked luggage (Pet. App. 7a-8a). The two locks on the footlocker were opened with the keys which had been previously seized from Machado; the two suitcases were broken open forcibly (Pet. App. 8a, 53a). Substantial amounts of marijuana were found inside each piece of luggage (Pet. App. 8a).

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[1] Contrary to the government's assertion at Government Brief 4, (hereinafter "GB"), no marijuana was found on Chadwick at that time. It was a later search of Chadwick's person, which occurred after Chadwick had been taken to the federal building, which produced a small quantity of marijuana (Pet. App. 7a, 36a).

It is conceded that the agents made no efforts to obtain warrants to search the luggage (see A. 44; Pet. App. 8a, 36a). Nor did the government offer any evidence to suggest that any haste was necessary or even that the agents might have been inconvenienced in the slightest by compliance with the warrant requirement before entering the locked luggage. Indeed, the district court noted that "the arrest took place within 10 blocks of the federal courthouse past which the agents traveled on their way to [the federal building, a five minute trip from the station (Pet. App. 5a)] where the actual search took place" (Pet. App. 50a).

Decisions of the Lower Courts.

At each previous stage of this case — the hearing on the motion to suppress, the reconsideration of that motion, and the appeal — the government took an entirely different position with respect to the luggage searches. Accordingly, at each stage, the lower court was asked by the government, and answered, a different set of questions.

Stage 1: In its original opposition to respondents' motion to suppress, the government relied "exclusively" on one theory — the "automobile exception" — to justify the warrantless searches of all three pieces of luggage (Pet. App. 33a, n. 1, 46a, 54a). It argued that because the luggage had been placed in a parked automobile just prior to the seizure, the "automobile exception" immunized the agents from their Fourth Amendment duty to obtain a search warrant (*id.*, 9a, 46a, 51a). The district court, finding that "there was no nexus between the search and the automobile" — and no "danger that if the warrantless search were not permitted, [the] contraband might well disappear" (Pet. App. 48a) — rejected the government's theory (*id.*, 48a-49a). The district court also found that no exigency existed to justify the government's neglect to obtain a warrant, and that no other exception to the warrant requirement was applicable (*id.*, 50a-51a).

Stage 2: Upon petitioning the district court for reconsideration the government tried an entirely new approach. It separated the question of the suitcases from that of the footlocker and argued that, as to the footlocker, the search was justified as incident to the arrests (*id.*, 10a, 54a), while, as to the suitcases, the "breaking open" was not really a "search" at all but was done merely to "inventory" their contents (*id.*, 20a, 57a). The district court rejected both theories: the footlocker, it found, "as a matter of fact, practicality and law . . . was simply not within the control of the defendants at the time of arrest" (*id.*, 56a) and the "breaking into the suitcases" could not be justified as a routine "inventory search" (*id.*, 58a-59a).[1]

Stage 3: The court of appeals reviewed and upheld each of the answers given by the district court. It agreed that the "automobile exception" could not control since, under the circumstances of this case, "the floor of the automobile was nothing more than a platform or resting place for the footlocker" (Pet. App. 10a). It also agreed that the search of the footlocker could not be justified as an incident to the arrests of the respondents, stating:

> "It is difficult to liken this footlocker to a hand-carried bag and say in any meaningful sense that the footlocker or, more importantly, its contents, were under defendants' immediate control. It was far from portable, and too heavy even to be carried by the average person. It had also, as the agents well knew, just been unloaded from a train's baggage car after a cross-country trip suggesting, as proved to be the case,

[1] Because of the physical proximity of the suitcases and the footlocker to one another at the time of the arrests, the district court also made an additional finding that the "search-incident exception" could not save the suitcase searches; the court found that, as with the footlocker, "there was no showing that, at the time of arrest, the suitcases were within the immediate possession or control of any of the defendants" (Pet. App. 57a-58a).

that it was tightly secured and could not be opened; nor did the agents observe it open before they themselves opened it. We thus see no basis for disturbing the court's finding that, for purposes of the *Chimel* standard, "this footlocker was simply not within the control of the defendants at the time of arrest." (Pet. App. 15a).[3]

Finally, noting the district court's finding that the footlocker "was not in imminent or even potential danger of being destroyed or spirited away," the court of appeals agreed that "there was no special exigency justifying a warrantless search under the circumstances" (Pet. App. 19a). Nor, the court added, had the government ever even argued that there were any exigent circumstances (*id.*).

The court of appeals also responded to two new theories raised by the government at this stage. One theory was that because the arrests had occurred outside any dwelling, the legality of the warrantless footlocker search should not be tested by the "stringent" standard of *Chimel* v. *California*, 395 U.S. 752 (1969), but rather by the more liberal standard of "reasonableness" (Pet. App. 11a-12a). The court of appeals rejected this argument, stating that it knew of "no decision of the Supreme Court . . . more relevant to the arrest situation presented here" than *Chimel* — and that *Chimel*, like the Fourth Amendment itself, is not limited by rationale or precedent to arrests occurring only inside houses (Pet. App. 12a).

The other new theory — calling for "liberalized baggage search rules" which would dispense with the warrant requirement altogether in connection with luggage searches outside the home — was suggested, but not squarely presented, by the government.[4] The court of appeals did, however, consider and reject it. Pointing out that the new approach suggested by the government "could have considerable impact, as its premises might seem to apply not only to baggage but to mail, express packages, and moving freight of all description" (Pet. App. 18a), the court of appeals noted that such a "would-be exception" hardly meets the requirement that exceptions to the warrant rule be "specially established" and "well-delineated" (*id.*).[5]

[3] The court of appeals also affirmed the district court's finding that the suitcases were outside respondents' control at the time of arrest (Pet. App. 20a) and that their warrantless search could not be justified as a reasonable inventorying (Pet. App. 23a).

[4] As the court of appeals noted: "While we understand the government to be relying on the search-incident-to-arrest exception, part of its argument *suggests* that it may also be looking in the direction of liberalized baggage search rules. . . ." (Emphasis added.) (Pet. App. 16a.)

[5] Senior District Judge Thomsen, writing in dissent, disagreed, stating that in his opinion the warrantless search of the footlocker was permissible under the same "principles which control the right of an officer to arrest without a warrant a person who is committing a felony in his presence in a public place. . . ." (Pet. App. 29a-30a.)

Introduction and Summary of Argument.

The government in this case seeks to amend the Fourth Amendment so as to eliminate the warrant requirement for all searches of "persons" and "effects" except those which occur inside the home or office, or involve selected kinds of communications.

Both lower courts found, on the facts, that the government had failed to meet its burden of proving that the warrantless search of the securely locked, virtually nonportable footlocker was lawful: both courts found that no exception or exigency excused the neglect of the agents to seek advance judicial approval for the search. These rulings were based on the most fundamental tenet of Fourth Amendment jurisprudence — that a search conducted in the context of a criminal investigation, depending for its justification on an individualized determination of probable cause, must be authorized in advance by a neutral and detached judicial officer, unless one of the "few specifically established and well-delineated exceptions" is proved by the government. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971), quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967). For the last century this rule has formed the cornerstone of Fourth Amendment law, and, as the government concedes, has, in the context of criminal investigative searches, been stated in broad and unequivocal terms. See GB 32. The underlying purpose of this rule is to secure to "the individual [his] legitimate expectation of privacy against the overzealous police officer." *South Dakota* v. *Opperman*, ____ U.S. ____, 96 S. Ct. 3092, 3097, n. 5 (1976).

Here, faced with the lower court rulings — and aware that it cannot secure the reversal of decisions based on the application of settled principles to the facts of a particular case — the government now asks this Court to amend the warrant clause and restructure its rule so that it will no

longer apply to a case such as this in which personal effects outside the home are searched on the belief that evidence of crime will be found. Henceforth, under the government's proposed new rule, the warrant requirement would apply solely and exclusively to property which is found *inside* the home or office, and to "private communications" conducted over the telephone or via first-class mail; in all other situations the obligation to seek advance judicial approval would be eliminated and the law enforcement officer in the field would be entirely free to conduct warrantless searches based on his own determination of probable cause. A shopper's parcels, a lawyer's litigation bag, a traveler's padlocked steamer trunk, would all fall into the warrant-free zone of non-privacy.

In the past, when the government has sought to expand the right to search without a warrant it has done so on the basis of argument and evidence demonstrating the need for swift police action under particular circumstances. Here, however, it seeks the broadest possible expansion of the searching power without even suggesting that such an expansion is compelled by practical considerations of effective law enforcement. And the few theoretical arguments it does offer the Court in support of its unprecedented request are without valid evidentiary support and ignore or conflict with unimpeached decisions of this Court.

Initially, the government argues that the Framers' "intent" was to exclude personal "effects" outside the "home" from the protective scope of the warrant requirement. Ignoring the plain wording of the Amendment itself — guaranteeing "the right of the people to be secure in their *persons, houses, papers, and effects*" and requiring that a warrant describe "the place to be searched" (emphasis added) — the government claims that the Framers intended to distinguish "effects" from the other categories and to afford them protection only *inside* "houses," and further intended to limit "the *place* to be

searched" to the "home." This is, on its face, an absurd reading of the plain language of the Amendment and it finds absolutely no support in the historical record.

Indeed, the only real evidence offered by the government in support of its historical theory is that the Framers were "preoccupied" with the hated writs of assistance. But, as the government itself concedes, the writs empowered officials "to enter *anywhere*" to search for smuggled goods (GB 22; emphasis added), and ". . . to open *any* trunks, chests, boxes, parcels or packs . . . whatever in which goods, wares, or merchandise [were] suspected to be packed or concealed." Quincy, *Reports of Massachusetts Bay* 404-405 (1865) (emphasis added). This all-encompassing searching power was plainly not limited to the home. Ironically, had there been railroad trains and stations during colonial times, the search of the footlocker in this case would have been conducted squarely under the authority of a writ.

Furthermore, the government's reliance on a claim of colonial unconcern about warrantless searches of chattels outside the home assumes that an *absence* of articulated outcry means that the colonists either acquiesced in such search practices or would have acquiesced had such practices been the most abusive ones occurring at the time. As Amsterdam points out, however, the "absence of controversy" over a particular evil cannot be used to "support the negative inference" that the Framers did mean "to limit or forbid or [that] evil." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 397, 398 (1974).

Nor does the early history of Congressional and judicial interpretation of the searching power support the government's view. The early legislation cited by the government applied exclusively to *customs* situations and granted power to search only for goods imported in violation of customs laws. And, moreover, even the customs searching power was circumscribed by procedural safeguards which were more protective than customs practices today. The message of the

earliest Supreme Court decisions interpreting the Fourth Amendment is even clearer: no distinction was made between the protections of the Fourth Amendment within and without the home (*Ex parte Burford*, 3 Cranch 448 (1806); *Ex parte Jackson*, 96 U.S. 727 (1877); *Boyd* v. *United States*, 116 U.S. 616 (1886)), and "letters and sealed packages" were guarded by the warrant clause "wherever they may be." *Ex parte Jackson*, *supra*.

Moreover, even if the government were correct that the Framers sought only to extend the warrant requirement to the internal boundaries of their homes, that intent emerged out of a home-bound age. In today's world, in which travel and mobility play a vital role in society, the need to protect one's privacy in baggage is certainly as great as was the colonial need to protect the privacy of one's home. Increasingly the American family is on the move — lugging with it, in cardboard boxes, suitcases and trunks, all the possessions of its "home." Even on brief business or vacation trips the traveller carries along personal papers and possessions which "touch upon intimate areas of an individual's personal affairs" which may "reveal much about a person's activities, associations and beliefs." *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring).

The government concedes that, under the modern construction of the Fourth Amendment, the "maximum protection from governmental search and seizure" — the warrant requirement — is bestowed upon a particular interest when there is a "practical realization of [a] considerable expectation of privacy" in that interest and an "intrinsic societal importance of satisfying that expectation." GB 30. It is settled, however, that that expectation of privacy is measured *not* by the four walls of the individual's home but by "what he seeks to preserve as private, even in an area accessible to the public." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Thus, even though Katz allowed himself to be "visible" through the glass portion of the telephone booth, the Court held that he was nonetheless "entitled to assume" that the aspect of his life he *had* sought

to preserve as private — the wagering conversations in which he had engaged — would "not be broadcast to the world." 389 U.S. at 352. The plain implication of this principle is that when a traveler places his effects inside opaque, locked luggage and leaves his home, he does not, *by virtue of leaving his home*, waive his right to keep those effects "private and away from prying eyes."

Nor does the mere fact that luggage is "movable" entitle the government to treat luggage as identical to the automobile for purposes of the Fourth Amendment. As the government itself concedes, while the mobility of an automobile "may frequently excuse the warrantless *seizure* of a car under the 'emergency' exception to the warrant requirement, [that mobility] is analytically an *insufficient justification* for the subsequent *search* of the car without prior judicial approval." GB 35 (emphasis on "seizure" and "search" in original). The key factor which justifies the post-seizure warrantless search of the automobile is the recognized "lesser expectation of privacy" in the automobile. GB 35. Even when detained by law enforcement officers, luggage which is securely locked does *not* lose its "significant Fourth Amendment" interest — an interest in the privacy, not of the outer trappings, but of the *inner* contents, kept "private and away from prying eyes." See *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). It is that interest which, under the plain intendment of the Fourth Amendment, may not, in the absence of exception or exigency, be breached without prior judicial authorization. *Id.*

The government runs roughshod over these most basic principles in its quest for expansion of the searching power — and in doing so it totally reverses the reasoning process which has undergirded Fourth Amendment analysis for at least a century. It assures the Court that if the warrant requirement were eliminated outside the boundaries of the home, no benefits to the citizen would be lost because *probable cause* would still remain "a stringent requirement" before a law enforcement officer could properly search the citizen's locked luggage (GB 44): once thought a

necessary prerequisite to obtaining a warrant, *probable cause*, according to the government, would now be sufficient to *dispense* with a warrant.

The government argues further that, especially when the probable cause at issue is probable cause to believe that contraband is present, no warrant should be necessary because of an asserted lesser expectation of privacy in contraband. But this assumes as its very premise that the searching officer is always right when he formulates a belief about what will be found as the result of a search; for if the searching officer is wrong, and contraband is *not* found, then there is *no* lesser expectation of privacy to justify the failure to obtain a warrant.

Finally, the government argues alternatively that if probable cause alone is not sufficient to dispense with the warrant requirement, then the addition of the fact of arrest makes it sufficient. The government does not limit this elimination of the warrant requirement to situations in which the objects to be searched are within the "immediate control" of the arrestees; on the contrary, conceding the rulings of the courts below that in this case the search of the footlocker was not justifiable as a search incident to arrest under the standard of *Chimel* v. *California*, 395 U.S. 752 (1969), the government argues that a search of *any* belongings, outside the reach, but within "the possession," of the arrestee, is permissible without a warrant. By this argument, the government seeks *sub silentio* to resurrect the holding in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950) — squarely overruled by this Court in *Chimel*. But even under *Rabinowitz* the rule allowing searches "accompanying" arrests was limited to *contemporaneous* searches and to situations in which obtaining a warrant was impracticable. Here, however, the search took place an hour and a half after the arrests — and the government has never even suggested that it would have been impracticable or even inconvenient to obtain a warrant.

In sum, the government has offered not a single reason to take the drastic measure it proposes: neither its unsupported divination of the Framers' intent, nor its inaccurate analogy between locked luggage and the automobile, nor its hindsight reasoning from the results of the search, nor, finally, its desire to resurrect the discredited rule that the mere fact of arrest allows a search of personal property unrestrained by either the limits of the *Chimel* standard or advance judicial approval, can justify elimination of the warrant requirement for searches of locked luggage outside the home.

Argument.

I. The Fourth Amendment Warrant Requirement Applies To Personal Effects "Wherever They May Be" And Neither History Nor Decisional Law Supports Limitation Of The Warrant Clause To The "Home."

As the government concedes, "the constitutional preference for a warrant and the presumptive unreasonableness of a warrantless search" has been articulated by this Court in broad and unqualified terms. GB 32. Indeed, this Court has described that unqualified preference as "the most basic constitutional rule in this area" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 454 (1971)), emphasizing time after time that a probable cause search, conducted without a warrant, is "unreasonable under the Fourth Amendment" — unless one of the "few specifically established and well-

delineated exceptions" is proved by the government (see *Katz* v. *United States*, 389 U.S. 347, 357 (1967)).[6]

> "The exceptions are 'jealously drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971).[7]

A. *In The Criminal Context, It Is The Warrant Requirement Which Protects The Person's Legitimate Expectation Of Privacy.*

It has never been doubted that the "central warrant requirement" (Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 394 (1974)) is tied inextricably to the concept of probable cause. As the government concedes, it "is by now axiomatic that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause.'" GB 9, quoting *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring). Just last Term, in *South Dakota* v. *Opperman*, *supra* ____ U.S. at ____, 96 S. Ct. at 3097, n. 5, Mr. Chief Justice Burger pointed out that the warrant requirement is "linked . . . textually . . . to the probable cause concept."

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[6] This rule has been stated without qualification in numerous decisions of this Court: *e.g.*, *South Dakota* v. *Opperman*, ____ U.S. ____, ____, 96 S. Ct. 3092, 3097 (1976) (Powell, J., concurring); *Agnello* v. *United States*, 269 U.S. 20, 33 (1925); *Wong Sun* v. *United States*, 371 U.S. 471, 481-482 (1963); *Jones* v. *United States*, 357 U.S. 493, 498 (1958); *Cady* v. *Dombrowski*, 413 U.S. 443, 439 (1973).

[7] As Amsterdam points out, all the "exceptions" to the warrant requirement (with the exception of consent) are based on the principle of "necessitous haste." Amsterdam, *supra*, 58 Minn. L. Rev. at 395.

Probable cause is not, however, an element in all Fourth Amendment search cases. As the Court noted in *Opperman*, "[t]he standard of probable cause is peculiarly related to criminal investigations." *Id.* Thus, the court noted that when searches are conducted outside the "criminal-investigative-enforcement process," in contexts requiring routine, standardized procedures conducted for caretaking or protective purposes, "[t]he probable cause approach is unhelpful." *Id.* In such situations — in which the search is not justified on the basis of an individualized determination of probable cause — the warrant requirement also has a reduced usefulness, and consequently this Court has upheld such searches as "reasonable" without a warrant. *Id.*[8] This Court has, however, consistently enforced the warrant requirement when the search occurred in the context of a criminal investigation and was based on an individualized determination of probable cause. See, *e.g.*, *Katz*, *supra*.[9] Indeed, the warrant requirement for probable cause searches — and the presumption that a warrantless probable cause search is "unreasonable" — has been a corner-

[8] *E.g.*, *Opperman*, *supra*; *Cooper* v. *California*, 386 U.S. 58, 61-62 (1967); *Harris* v. *United States*, 390 U.S. 234, 236 (1968), and *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973), upholding routinized inspection procedures in connection with standard caretaking functions (see *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3098-3099, discussing the rationale for the *Cooper*, *Harris* and *Cady* decisions). *United States* v. *Martinez-Fuerte*, ____ U.S. ____, ____, 96 S. Ct. 3074, 3083 (1976), upholding "routine checkpoint stops" in connection with enforcement of customs and immigration laws conducted in a "regularized manner" at fixed checkpoints "not chosen by officers in the field"; *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968), upholding intrusion in context of need to protect law enforcement officers or others from immediate danger.

[9] Additionally, warrants have sometimes also been required outside the context of a criminal investigation when

> "[t]he practical effect of [the warrantless search procedure was] to leave the occupant subject to the discretion of the official in the field." *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967).

stone of this Court's Fourth Amendment jurisprudence for at least a century.[10]

Central to the distinction between the "reasonableness" of warrantless searches in non-probable cause settings on the one hand, and the necessity of a warrant when probable cause is at issue on the other, is the notion that the Fourth Amendment interest in privacy is peculiarly threatened when a law enforcement officer singles out an individual for a search "to discover evidence of crime." *Opperman*, *supra*, ____ U.S. ____, 96 S. Ct. at 3103 (Powell, J., concurring). As the Court recently noted in *Fisher* v. *United States*, 425 U.S. 391, 400 (1976):

> "The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy become justified and a warrant to search and seize will issue."

The special protection to privacy provided by the warrant is, as this Court has "frequently observed," that

> "[t]he warrant requirement assures that legal inferences and conclusions as to probable cause will be drawn by a neutral magistrate unrelated to the criminal in-

[10] See, *Boyd* v. *United States*, 116 U.S. 616 (1886); *Ex parte Jackson*, 96 U.S. 727 (1877); *Gouled* v. *United States*, 255 U.S. 298 (1921). In *Gouled*, the Court stated:

> "Searches and seizures are as constitutional under the Amendment when made under valid search warrants as *they are unconstitutional, because unreasonable, when made without them*, — the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All this is abundantly recognized in the opinions of the *Boyd* and *Weems cases*. . . ." (Emphasis added.) 255 U.S. at 308.

See also Amsterdam, *supra*, at 363.

vestigative-enforcement process." *Opperman, supra,* ___ U.S. at ___, 96 S. Ct. at 3097, n. 5.[11]

Thus, in "the criminal context [it is] the requirement of a warrant [which] protects the individual's legitimate expectation of privacy against the overzealous police officer." *Opperman, supra,* ___ U.S. at ___, 96 S. Ct. at 3103 (Powell, J., concurring).

Inevitably, when no warrant is required, and the neutral judgment of the magistrate is lost, the risk of improper intrusions into the privacy of innocent persons multiplies greatly — even assuming all searching officers act in good faith. Such officers are, after all, "engaged in the often competitive enterprise of ferreting out crime" (*Johnson* v. *United States*, 333 U.S. 10, 14 (1948)) and thus may not be relied upon to achieve the precision of the neutral magistrate in sifting evidence, separating fact from suspicion, determining dispassionately whether additional investigation is necessary, and setting precise and predefined limits on the scope of the search. In *Katz, supra,* this Court specifically recognized that the agents in that case "acted with restraint" (389 U.S. at 356) and on facts sufficient to secure a warrant had they sought to do so. *Id.* at 354. It held, however, that this was not enough:

> "[T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They

[11] "A related purpose of the warrant requirement is to prevent hindsight from affecting the evaluation of the reasonableness of a search." *Opperman, supra,* ___ U.S. ___, 96 S. Ct. at 3103 (Powell, J., concurring).

> were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." 389 U.S. at 356-357.

B. *No Valid Reading Of History Supports The Government's Unprecedented Claim That Even In The Absence Of Exception Or Exigency The Fourth Amendment Warrant Requirement Applies Only To The "Home."*

Although the government can point to no case in the area of criminal investigatory searches in which this Court has signaled a retreat from the "most basic" rule -- imposing the warrant requirement on all probable cause searches — the government now seeks to restructure the contours of that rule and confine its operation exclusively to two situations: searches of homes or offices, and searches of "private communications," as defined by the government.[12] See GB

[12] Although the government assures at several points in its brief (GB 12, 13, 30) that it does not seek to eliminate the warrant requirement in connection with searches of "private communications," a careful reading of the government's position reveals that in actuality the government would apply the warrant requirement to "private communications" only in two contexts — when such communications were conducted either over the telephone or through the use of first-class, domestic mail (GB 30, n. 18, 44, n. 31). Thus, all "private communications" conducted through other channels — ranging from use of cable or teletype communications, to delivery of written communications by privately-hired messenger service, to sending papers by other forms of mail — would presumably be subject to searches and seizures on the same warrantless terms the government claims should apply to situations outside the home or office.

12-13, 29-31. For all other searches conducted in connection with the investigation, the government would *eliminate* the warrant requirement altogether. Henceforth, probable cause, as determined by an individual law enforcement officer operating in the field, would suffice to authorize the search and seizure of a citizen's personal property found outside home or office — whether that property were carried in a brown paper bag, a locked attache case, or a padlocked steamer trunk.

The government does not seek to justify this proposed revision of the "most basic" rule as a new "exception" to the warrant requirement, demanded by "exigencies" which make "that course imperative." See *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 454-455. Indeed, the government makes no claim of emergency or law enforcement need, or even convenience of the searching officers.[13] Rather, adverting to the principle of "reasonableness" — which it describes as "the guiding standard of the Fourth Amendment" (GB 10) — the government asserts that a probable cause search is "reasonable," and therefore permissible, without the protection of a warrant, so long as the privacy interest at stake falls outside of what the government defines as the "core" "privacy areas" of home and private communications. GB 10, 12.

There are two fundamental errors in this contention. First, the government draws its "standard" of "reasonableness" from cases in which probable cause was *not* in issue and in which the warrantless invasions of privacy were

[13] It is noteworthy that at *no* point during this entire litigation has the government ever raised a claim of exigency, and both lower courts specifically found that none existed to excuse the agents' neglect to obtain a warrant (Pet. App. 19a, 50a).

justified as caretaking or protective measures.[14] Second, in defining what it terms the "core" "privacy areas," the government ignores its own advice that Fourth Amendment analysis must depend "upon the facts and circumstances of each case" (GB 9) — and totally ignores the modern construction of the Fourth Amendment, discussed below at p. 47 et seq., which defines privacy in terms of reasonable expectations of privacy and not predefined "areas."[15]

Because the government's analysis flies so directly in the face of the established and unqualified presumptive warrant requirement and so violates the principles which have shaped the development of Fourth Amendment law during the past century, the government is forced to seek support for its reasoning process by jumping back in time to the

[14] The cases cited by the government for this "standard" are *Opperman*, *supra*; *Cooper* v. *California*, 386 U.S. 58, 59 (1967); and *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (GB 9), all cases in which the searches were upheld on the grounds of caretaking or protection. The government's wholesale importation of the "reasonableness" concept into cases in which private property is searched neither as a routine procedure nor for protective purposes, but rather "in order to discover evidence of crime" (see *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3103 (Powell, J. concurring)), harks back to previous efforts the government has made to argue that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable" — a view which, however, "has not been accepted" by this Court. *United States* v. *United States District Court*, 407 U.S. 297, 315, and n. 16 (1972). See *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3102 (Powell, J., concurring).

[15] Like its reliance on the concept of "reasonableness," the government's would-be restriction of the warrant requirement to two core "privacy areas" harks back to earlier unsuccessful efforts it has made to persuade this Court to uphold warrantless searches as falling outside a "constitutionally protected area." See *Katz*, *supra*, 389 U.S. at 351.

original "intent" of the Framers.[16] Claiming to divine the Framers' true intent — and claiming that the application of the warrant requirement to any searches "outside the privacy of the home" (GB p. 25) runs counter to that intent[17] — the government argues that now is the time to undo at least the last century of this Court's Fourth Amendment jurisprudence, retrace the detour once made and return to the original "intent" of the Amendment.

It is highly doubtful that the government's exercise in retrospective analysis of colonial intent can serve any useful purpose in evaluating the competing social policies which must be reconciled in Fourth Amendment decisions made today, some two hundred years later. However, even if

[16] The government also seeks support, in a subsidiary fashion, by drawing an analogy between baggage outside-the-home and the automobile, and arguing that the same principles which created the "automobile exception" should now be applied to eliminate the warrant requirement for searches of luggage found in public places. The analogy, however, is false: as will be fully demonstrated below at pp. 53-58, the reasonable expectation of privacy in the contents of one's luggage — particularly if visibly locked and secured — is far greater than one's "lesser expectation of privacy in a motor vehicle . . . [whose] function is transportation and . . . [not] the repository of personal effects." See *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974); *Opperman*, ___ U.S. at ___, 96 S. Ct. at 3096.

[17] The government never claims that the intent of the Framers also justifies including within the class of searches protected by the warrant requirement those searches outside the home but of "private communications." Indeed, the government never offers *any* historical argument to rationalize its claim that the Framers intended the warrant requirement to apply *only* to searches conducted *inside the home* with its broad concession that the warrant requirement *does* apply to "private communications" conducted in public places. Rather, it concedes that the basis for including "private communications" in its class of "core" privacy interests rests not on history but on the modern and "practical realization of the considerable expectation of privacy placed on conversations held in private and the intrinsic societal importance of satisfying that expectation" (GB 30). As will be discussed below, p. 47 et seq., however, this "practical realization" applies with equal force to the expectation of privacy placed in a securely locked piece of baggage which is carried outside one's home and "the intrinsic societal importance of satisfying that expectation" is no less.

this Court were inclined to retrace the origins and history of the Amendment in the belief that it should be bound by a narrow reading of the Framers' intent, the result reached would in no way support the drastic curtailment of the warrant requirement which the government now seeks to impose. On the contrary, as will be demonstrated below, the historical evidence affirmatively supports the opposite conclusion — namely, that the protections of the warrant clause were intended to encompass personal property whether inside or outside the home.

C. *Contrary To The Government's Claim, The Historical Record Indicates An "Intent" To Include Within The Warrant Requirement Searches Of Personal Effects "Wherever They May Be."*

The essence of the government's historical argument is its claim that "the primary, if not the sole, purpose of the Fourth Amendment" was to protect against the free-wheeling house searches which had been authorized by colonial writs of assistance, and that, therefore, the Framers never intended the protections of the warrant clause to spill outside the home and encompass searches of personal property in public places. GB 10. At bottom, this claim is built on a faulty reasoning process which totally ignores certain aspects of the historical record and, moreover, draws its major strength from a series of negative inferences based not upon historical data but upon *absences* of such data from the record.[18] The government introduces no evidence which affirmatively establishes or even indicates that the Framers *intended to exclude* searches of personal property

[18] Since ancient times, philosophers have recognized this type of reasoning to be the fallacy of *argumentum ad ignorantium*. See, *e.g.*, R. Popkin, *Philosophy Made Simple* 165 (1956) ("This argument contends that some statement must be true because there is no evidence to disprove it.").

found outside the home from the protections of the warrant clause. And the historical evidence which is available — particularly the text of the Amendment itself — points strongly in the opposite direction. Certainly the 19th century interpretations of the Fourth Amendment by this Court leave no doubt that, *at that time*, it was recognized that the warrant clause did not evaporate at the door to an individual's home.

1. The Government Supplies No Actual Evidence Of An "Intent" To Exclude Personal Effects Outside The "Home" From the Protections Of The Warrant Clause.

Noting, quite rightly, that the Fourth Amendment was adopted against a background of abuse arising primarily from the unrestrained use of the general warrant to rummage through houses, the government makes two observations: first, that "the historical record reflects no . . . concern by the colonists . . . at the spectre of an unjustified search or seizure of chattels that had voluntarily been removed from the dwelling" (GB 24), and, second, that "nothing in the pertinent history suggests that the Framers were troubled by warrantless searches outside the home. . . ." GB 25. From these two *absences* in the historical record, juxtaposed against the affirmative evidence of opposition to general house searches, the government seeks to draw the conclusion that the colonists *had* no objection to warrantless searches of chattels which occurred outside the home and therefore intended the warrant clause to apply to in-house searches only.[19]

[19] It should be noted that the government's reasoning process, if adopted, would lead with equal force to the conclusion that the reasonableness clause of the Fourth Amendment *also* was not intended to apply to searches of chattels outside the home: if the Framers were so unconcerned about such outdoors searches as to omit them from the reach of the warrant clause, there is no reason to conclude that they intentionally included them within the reasonableness clause. This is especially so since, as the government argues, the reasonableness clause was "stated merely as a basis" for the condemnation of the writs of assistance and had no independent significance. GB 26, citing Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 81, n. 10 (1937). See also Landynski, *Search and Seizure and the Supreme Court* 42-43 (1966). (The government attempts to paper over this flaw in its reasoning process with the bare, conclusory assertion that the Framers were "content to leave such searches [which occurred outside the home] to the test of reasonableness." GB 11.)

The unstated major premise of the government's syllogism is that the colonists were in fact *subjected* to all types of searches and seizures of personal property outside the four walls of their homes and unauthorized by writs of assistance. Plainly, unless so subjected, the colonists' *lack* of publicized objection to anything other than general house searches cannot be read as an indication that the colonists *acquiesced* in such searches and therefore intended the Fourth Amendment to exclude them. But that unstated premise is demonstrably false. Indeed, the reason that there is no recorded evidence of controversy about warrantless searches of personal property outside the home is that, except for the narrowly circumscribed search-incident-to-arrest, there were no such warrantless searches in public. To place the silence of the Framers in proper perspective, it is necessary to review the types of searches which in fact formed the experience from which that silence arose.

THE SEARCHING POWER DURING COLONIAL TIMES.

During the colonial period — apart from the searches authorized by writs of assistance to which the colonists raised such vociferous objections — there were only two other types of searches: the common law search incident to arrest and the search for stolen goods. Taylor, *Two Studies in Constitutional Interpretation* 24-29 (1969). The first was a true warrantless search. But, as Taylor points out, it was a power rarely exercised since it applied only to the arrest

of felons (and "a man leaves himself open to an action . . . if he takes as a felon one who has done no felony") and since "arrests were rarely made except when there was hot pursuit after a 'hand-having' thief," (Taylor, *supra*, at 28 (quoting Pollock and Maitland)), or upon "hue and cry" after a "dangerous cut-throat" (see *id.* at 39). It was, moreover, a power usually exercised not by a government official, but rather by the private victim of the theft or attack who was able to outrun and overtake the violator of his rights. In such restricted form, this warrantless search "had the full approval of bench and bar" in both America and England (*id.* at 29); indeed, the absence of governmental involvement and the plain justice and necessity of allowing such searches guaranteed community support for the practice. As Taylor comments, "What need for a warrant to justify a search that was so natural a concomitant of apprehending and convicting a dangerous cutthroat?" *Id.*, at 39.

The second type of search did, however, require a warrant. If the "hand-having" thief got away, and the victim reasonably believed that he knew where the stolen goods were secreted, the victim could obtain a warrant to search for the stolen goods — a warrant which expressly allowed him to enter the premises of another. Kaplan, *Search and Seizure: A No-Man's Land in Criminal Law*, 49 Calif. L. Rev. 474-475 (1961). As the government itself recognizes, this type of warrant resembled that ultimately required by the Fourth Amendment: "it was surrounded by procedural safeguards such as an allegation of probable cause under oath, and it could only be issued by a court." GB 18.[20] Moreover, as the government also recognizes, gradually the type of warrant used to search for stolen goods could also be obtained to search for "two forms of contraband — goods

[20] Additionally, as was the case with the common law arrest, the accuser who initiated the process risked heavy damages were he mistaken about his facts. Kaplan, *supra*.

on which the proper tax had not been paid and the means or instrumentalities of a crime." GB 18, citing Kaplan, *supra*, at 475. This expansion of the subject matter brought the stolen-goods type warrant even closer in substance to the warrant requirement eventually incorporated into the Constitution.

Thus, when the government points out a lack of recorded controversy about warrantless searches of chattels found outside the home, the most that it does is point out an absence of controversy about the common law power to conduct a warrantless search incident to arrest without a warrant. It should hardly occasion surprise that the long-sanctioned common law right to search the hand-having thief or cutthroat incident to his arrest was not a burning issue in Revolutionary days. The only other types of searches which were known — those for stolen goods or the like, or those encompassed by the writs of assistance — were in fact searches which could *not* be done *without* some form of warrant.

THE ALL-INCLUSIVENESS OF THE WRITS OF ASSISTANCE.

Nor can the government rely on the colonial objection to one of those forms of warrants — the hated writs of assistance — as evidence that the colonists did *not* object to "warrantless searches outside the home" (GB 25) or to the "search or seizure of chattels that had voluntarily been removed from the dwelling." GB 24.[21] The government as-

[21] The government's only documentation for this assertion is a citation to Taylor's discussion of search incident to arrest at 39 and 43, where, however, no such distinction between chattels inside and outside the home is made. Elsewhere, Taylor points out that no special sanctity of the home placed restrictions on the search incident to arrest; indeed as long as the search was made contemporaneously, the arrest could validate a warrantless search of an entire household. Taylor at 28-29. The government's only other authority for this assumed distinction

sumes throughout its historical presentation that the writs of assistance were *limited* in scope and could not, or did not, authorize searches outside the home. But it offers no support for this assumption and the historical record indicates quite the opposite.

The colonial writs of assistance were aimed primarily at smugglers[12] and they empowered customs officials to search absolutely *anywhere* — "wherever they suspected uncustomed goods to be" (Lasson, *supra*, at 54), whether in public or private areas — and " . . . to open any trunks, chests, boxes, parcels or packs . . . whatever in which goods, wares, or merchandise are suspected to be packed or concealed." Quincy, *Reports of Massachusetts Bay* 404-405

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between the home and all other places — a distinction which is fundamental to its entire argument — is a recent Supreme Court case allowing warrantless arrests on probable cause in public places. *United States* v. *Watson* 423 U.S. 411 (1976), cited at GB 25 for this purpose. The government neglects to mention, however, that the common law recognized no greater distinction between homes and public places when it dealt with arrests than when it dealt with searches and seizures. At common law, officers of the peace could arrest felons *in their homes* without a warrant. Taylor at 27-29. Cf. *United States* v. *Santana*, 427 U.S. 38 (1976). Just as a colonial citizen could not claim immunity from lawful powers of the government merely by entering his home, so could the government not claim the power to unreasonably invade his rights of personal security merely because he left it.

[12] The general warrants prevalent in England during the 17th and 18th centuries — unlike the colonial writs of assistance — had been used primarily to seize papers and books in particular cases of libel. See GB 18-22. As even the government recognizes, the writs of assistance, which provided customs officials with "continuous license and authority" to conduct wide-ranging searches for smuggled goods without limitation to any particular cases, "were in many ways more objectionable than the general warrants." GB 22. It was the use of these writs — whose focus was smuggled goods — which appears to have most directly motivated the colonists to erect the protections of the Fourth Amendment.

(1865) (quoting a writ issued in 1755).[13] While the language of the writs may have specifically authorized the agents of the Crown to enter into houses, shops, warehouses, cellars, ships and other structures in order to locate and seize those "trunks, chests, boxes, parcels or packs" in which "goods, wares, or merchandise [were] suspected to be packed or concealed" (id.), that enumeration was inclusive, not exclusive, and did not *limit* the authority of the agents to conduct their searches and seizures only in those places named.[14] Indeed, the fact that houses, warehouses and ships were specifically enumerated in the writs would appear to reflect nothing more than the general recognition at the time that smuggled goods were most likely to be found in such places.[15]

Moreover, it is evident that to the extent that a ship was, in colonial times, comparable to the modern day railroad train — carrying passengers, baggage and goods belonging to persons other than the ship's owner — the opening of "trunks, chests, boxes, parcels or packs" found aboard ship

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[13] For fuller discussion of the powers granted by the writs, see, *e.g.*, Quincy, *Reports of Massachusetts Bay* 400-410, 500-510 (1864); Lasson, *supra*, at 32, 53-54; *Stanford* v. *Texas*, 379 U.S. 476, 481-484 (1965).

[14] "The Rights of the Colonists and a List of Infringements or Violations of Rights, 1772," 1 Schwartz, *The Bill of Rights: A Documentary History* 205 (1971), which describes the scope of a writ, thus includes in the list of places which can be searched the catch-all category *"or any other place* where any goods or merchandize lie concealed, or are suspected to lie concealed." (Emphasis added.) Clearly, "any other place . . . suspected" contains no limitation to suspected *private* places.

[15] At the time, smuggling was an activity confined primarily to the coast and particularly to cities like Boston, and its most profitable form involved the importation of molasses from the French and Spanish East Indies by ship. Lasson, *supra*, at 51-72. The searching pattern of the agents, therefore, was generally to first attempt to search ships at sea, then ships in the harbor, then wharfside warehouses, and, finally, in those cases where they suspected that the goods had travelled that far, homes. *Id.* Since very few, if any, of the smuggled kegs of molasses were transported overland (water travel direct to the port distillery being far more efficient), there was almost no reason to search individual travelers and their baggage in public places, and consequently there would be no pressing need specifically to enumerate the authority to search in such a context.

was in fact tantamount to a search and seizure of chattels in a public place. Since concededly such a search and seizure would have been unauthorized except by a writ of assistance, and since there is no doubt that the strong colonial opposition to the writs included opposition to their use aboard ship,[16] the government's claim that history reflects "no . . . concern about searches and seizures of chattels in public places" falls of its own weight.[17]

In sum, although few were issued, the writs of assistance contained within their four corners all the searching powers of the modern state; so general and expansive were their terms that there is not one type of search, then or now, which such writs could not be deemed to have authorized. Accordingly, when the government argues that the Fourth Amendment warrant clause was aimed at regulating only those powers authorized by the writs of assistance and nothing more (GB 10-11, 16-29), it is in effect conceding that the warrant clause was intended to encompass *all* government searches save those justified as incident to arrest[18] or those for stolen goods, done pursuant to a special

[16] See Schwartz, *supra*, at 205, in which the colonists include in their List of Infringements the use of the writs to conduct searches around "any Ship, Boat, or other Vessel, riding, lying or being within, or coming into any Port, Harbor, Creek or Haven. . . ." See also Lasson, *supra*, at 72.

[17] It is ironic that the government attempts to justify the warrantless search and seizure in this case on a theory that it falls outside the scope of the writs of assistance. Had the respondents lived in colonial times, their arrival in Boston would have doubtless been on board a ship, and the opening of the footlocker and seizure of its contents would have been done squarely under the authority of a writ.

[18] In arguing that the search and seizure of the locked footlocker in this case is of a type originally intended to be excluded from the warrant requirement, the government at no point tries to force the case into the established mold of the search-incident-to-arrest exception — a resolution rejected by both courts below (Pet. App. 15a, 56a). As discussed below at pp. 69-77, its reliance on the fact that respondents were under arrest at the time of the search (GB 13-14, 49-55) is limited solely to a wholly

warrant. Notwithstanding the government's protestations, such an all-encompassing intent necessarily *included* the kind of search at issue here — the search and seizure of locked luggage found in a public place. Thus, all the government's efforts to demonstrate a colonial "preoccupation with general warrants rather than warrantless searches" (GB 25) are misplaced. While the "legislative history" of the Fourth Amendment, and the colonial enactments of the time, may support the government's claim that the Fourth Amendment was aimed primarily against the writs of assistance (see GB 25-28),[19] that data gives *no* support to the government's ultimate contention that searches of personal property outside the home were deliberately excluded by the Framers from the protections of the Amendment.

Moreover, even if the government had brought forth evidence that public searches of chattels had occurred outside the authority of the writs, the fact that the colonists might have objected more strenuously to home searches pursuant to the writs cannot reasonably support the in-

untenable argument that once an arrest occurs the arrestee's legitimate expectation of privacy in *all* of his possessions — even a padlocked footlocker concededly outside his "immediate control" (GB 14) — becomes sufficiently reduced simply to void the warrant requirement altogether.

[19] The government makes much of the fact that the version of the Amendment that was ultimately adopted was not the one originally approved by the Committee of Eleven. GB 26-29. However, that historical fact adds literally nothing to the government's argument. The most the government can glean from that fact is that under the Committee of Eleven version the "preoccupation with general warrants" is clearer than it is under the ratified version. But no matter how definitive that "preoccupation," evidence that the primary concern of the colonists was to eradicate the abuses of the writs of assistance simply does not support the additional and separate claim that the colonists *acquiesced* in searches of personal property outside the home.

ference that they would not *also* have objected to public chattel searches without a warrant.[30] It was just such a fallacy that Lord Camden rejected long ago in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1067 (1765). There, Lord Camden concluded that the existence of numerous cases discussing challenges to stolen goods warrants, and the contemporaneous *absence* of any similar precedents challenging searches for papers, did *not* demonstrate that Englishmen had no objection to searches for papers, but rather provided "an undeniable argument against the legality" of all such searches. See Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945, 954 (1977). The type of negative inference advanced by the King's messengers in 1765 which was so clearly rejected by Lord Camden should not prevail now before this Court two hundred years later.[31]

Ironically, despite its contention that the warrant clause was designed as an antidote to the general searching powers authorized by the writs of assistance, the government now asks this Court to give the individual law enforcement officer a discretionary power to conduct searches in a manner strikingly similar to that authorized by those writs

[30] The government could argue as persuasively that, because the Stamp Act did not apply to personal correspondence, the colonists would not have objected if it had, or that, because a citizen does object to a wiretap on his home telephone pursuant to a warrant, he would not object to being intercepted without a warrant while telephoning from a public telephone booth.

[31] More recently, Amsterdam specifically criticized this type of reasoning process — "the use of background history to support the negative inference that [the Framers] did not [mean "to limit or forbid a particular evil"]" — as not fruitful, stating, "[t]he agreement of many minds upon the decision to disapprove particular practices does not signify the least agreement to approve other practices not upon the agenda." 58 Minn. L. Rev., *supra*, at 398, 395-399. See also L. Fuller, *American Legal Realism*, 82 U. of Pa. L. Rev. 429, 443-453 (1934).

— *viz*: ". . . to open any trunks, chests, boxes, parcels or packs . . . whatever in which any goods, wares, or merchandise are suspected to be packed or concealed" in which he reasonably believes contraband will be found. Instead of obtaining a writ of assistance, the law enforcement official — the government now contends — should be authorized to make such searches and seizures solely on the basis of his own field assessment of probable cause. By contrast, the searches which so incensed the colonists purportedly required *both* some minimal level of cause to believe that smuggled goods might be found, *and* a writ. Indeed, since the writs of assistance were issued solely to enforce colonial trade laws, and not to search for illegal or contraband goods generally, even a writ of assistance could not have authorized the searching power proposed by the government here.

2. Legislation Enacted By The Early Congresses Gives No Support For The Exclusion Of Personal Effects Outside the "Home" From The Protections Of The Warrant Clause.

The government claims that its view of the Framers' intent finds additional support in certain "legislation enacted by the very Congress that drafted the Bill of Rights, and by other early Congresses," legislation which, the government claims, "countenances warrantless searches outside the sanctity of the home." GB 29. The government cites for this proposition three statutory provisions — the Act of 1789, 1 Stat. 29, 43, the Act of March 3, 1815, 3 Stat. 231, 232, and the Act of July 18, 1866, 14 Stat. 178 — which had been previously cited by this Court in *Carroll* v.

United States, 267 U.S. 132, 149-151 (1925). While the portions of these statutes quoted by the government do, on their face, grant power to government officials under certain circumstances to search and seize goods in public places without a warrant, the mere fact that such provisions were enacted by the early Congresses obviously does not guarantee their constitutionality; it has never been presumed that every statute passed by the early Congresses was necessarily constitutional and therefore definitive of the limits of constitutional protections.[33] However, more significantly, when viewed in the context in which they were enacted — and when aspects of their operation not mentioned by the government are taken into account — it becomes readily apparent that these statutory provisions add nothing to the government's case.

All three of the Acts cited by the government were *exclusively customs laws*, regulating the searching powers allowed customs officials at international ports and boundaries, and all three granted power to search only for goods imported in violation of customs statutes.[34] Nor has Congress ever passed legislation which would have authorized such warrantless searches in situations unconnected with the control of international ports and boundaries where "[t]ravellers may be . . . stopped . . . because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belong-

[33] The Alien and Sedition Acts of 1798, for example, were plainly unconstitutional (see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 273-276 (1964)), although passed almost contemporaneously with the ratification of the First Amendment, and by many of the same people.

[34] The titles of the statutes are instructive: The Act of 1789 is entitled, "An Act to Regulate the Collection of Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares, and Merchandises Imported into the United States"; the Act of 1815 is entitled, "An Act Further to Provide for the Collection of Duties on Imports and Tonnage"; and the Act of 1866 is entitled, "An Act Further to Prevent Smuggling and For Other Purposes."

ings as effects which may be lawfully brought in." *Carroll* v. *United States*, *supra*, 267 U.S. at 154.[35] Indeed, the government has not cited a single statute giving law enforcement officers not charged with collecting customs duties similar powers to search without a warrant. Although the government seeks to convey the impression that the early Congresses manifested in the three cited provisions an intent to allow the kind of warrantless search at issue in the case at bar, these provisions simply do not admit of such an interpretation.[37]

Moreover, the government neglects to mention certain significant procedural safeguards which the early Congresses attached to the customs searches authorized by these provisions. Thus, the authority to search was vested in customs officials only, and not in law enforcement agents generally,[38] and the number of customs officials authorized

[35] Moreover, when the government has argued for an extension of the power to conduct border-type searches beyond the definable border area this Court has declined to so extend that power. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973); *United States* v. *Brignoni-Ponce*, 422 U.S. 872 (1975); *United States* v. *Ortiz*, 422 U.S. 891 (1975).

[37] *Carroll* cited these statutes for a different purpose entirely — to demonstrate that even the early Congress recognized the necessity for conducting a warrantless "search of a ship, motor boat, wagon or automobile, for contraband goods, *where it is not practicable to secure a warrant* because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U.S. at 153 (emphasis added). In other words, *Carroll* cited these statutes to support the concept of an exigent-circumstance exception, not the concept of a no-warrant standard.

[38] In its excerpt of the 1866 statute, the government has substituted the bracketed words "certain authorized officers or other persons" for the deleted words "any officer of the customs" (GB 42) — a change which substantially changes the apparent scope of the statutory power to search.

to make these searches was quited limited. The 1789 statute, for instance, provided this power to only one customs official in New Hampshire, to three in Connecticut, to two in New York, to three in New Jersey, to one in Pennsylvania, etc. 1 Stat. 29, 29-32. The 1866 statute further restricted the persons who might make such searches to those who had been "specially appointed as aforesaid" and whose "appointment in writing shall be filed in the custom-house where such appointment is made." 14 Stat. 178. And, the 1789 statute allowed customs officials to open packages only upon probable cause to believe that they contained smuggled goods and only "in the presence of two or more reputable merchants." 1 Stat. 29, 43. This last precautionary procedure suggests that the colonists perceived a significant difference between the seizure of such a package and its later opening, and, indeed, requiring the attendance of two reputable merchants before a package could be opened may well have served many of the same functions of the present-day warrant requirement.

A careful examination of the cited statutes in fact indicates that the early Congresses erected many more precautions and limitations around the customs search than are being implemented in that area today. While the 1789 statute required probable cause before any customs search could be made, and a valid warrant before a dockside warehouse could be entered, these precautions are no longer adhered to — presumably because of the vastly increased traffic of goods and persons across our borders each year.[39] Thus, the government cannot seriously rely on these three statutes to argue that the intent of the Framers was to

[39] Because citizens today may have a lesser expectation of privacy and law enforcement needs may be greater at our national borders and at customs checkpoints than at points in the interior — and because border search practices are routinized and not based on probable cause — search practices which may be justified in border areas will not be countenanced elsewhere. See, *e.g.*, *United States* v. *Ortiz*, 422 U.S. 891 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973).

provide a lessened protection for all private property outside the home. If anything, these statutes indicate a greater, not a lesser, protective attitude on the part of the early Congresses, and suggest that if the development of the searching power has deviated over the past two centuries from the intent of the Framers, it has deviated in the direction of a less protective approach.

3. The Language Of The Amendment And The Earliest Supreme Court Cases Construing It Affirmatively Indicate That The Fourth Amendment Makes No Distinction Between Personal Effects Within And Without The "Home."

In its determination to convince this Court that the Framers intended to exclude searches of personal property outside the home from the protection of the warrant clause, the government overlooks two major factors manifestly relevant to the issue of the Framers' intent — two factors which decisively undermine the government's position.

First, the government overlooks the very wording of the Amendment itself. Both in its final form and in the earlier version approved by the Committee of Eleven (which the government apparently views as a more trustworthy indication of intent, see GB 27-28) the Amendment guarantees "[t]he right of the people to be secure in their ***persons, houses, papers, and effects.***" (Emphasis added.) If the colonists wished to do no more than proscribe the use of writs of assistance to authorize searches of their ***homes***, why does the Amendment contain a seriatim listing of four categories without distinguishing among them, in each of which "the people" are to be "secure . . . against unreasonable searches and seizures"? There is simply no indication in the legislative history that the protected category of "effects" must be limited to "effects" ***inside the home*** in order to merit the full protection of the Amendment. Indeed, such an interpretation would not only require an arbitrary distinction

between "effects" on the one hand, and the other seriatim categories on the other,[40] but it would render the inclusion of the word "effects" absolutely superfluous and misleading.[41]

That the Framers had no intention of limiting the warrant clause to "houses" and to no other place is evident.

[40] Alternatively, the government presumably could argue that the distinction should be between "houses" on the one hand and "persons, papers, and effects" on the other. However, since "persons" and "papers" have both been explicitly held to be protected by the warrant clause even outside the home (see, *e.g.*, *Katz* v. *United States*, 389 U.S. 347 (1967), and *Ex parte Jackson*, 96 U.S. 727 (1878) (dicta)), such a reading of the Amendment would still leave "effects" arbitrarily and illogically isolated.

[41] Interestingly, an earlier version of the Amendment, proposed by the Committee of Twenty (including such notables as Patrick Henry, James Madison and John Marshall), used neither the word "houses" nor the word "effects." It read:

> "That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property, all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected persons, without specifically naming or describing the place or person, are dangerous, and ought not to be granted." Elliot's *Debates*, III, 658, quoted in Lasson, *supra*, at 95, n. 61.

Nothing in the legislative history suggests that the introduction of the phrase "persons, houses, papers, and effects" (which was apparently picked up from the provision adopted in 1780 as Article XIV of the Massachusetts Declaration of Rights, duplicated by New Hampshire in 1784, see Landynski, *supra*, at 38-39) was intended to change the scope of protection which Patrick Henry had described as the "person, his papers and property." Certainly, as Amsterdam points out, *supra*, at 397, "Mr. Justice Frankfurter, who more than any of the other Justices sought the Fourth Amendment's meaning in its history, found there no limitation . . . of the 'persons, houses, papers, and effects' that the amendment protects."

moreover, from the language used to specify the formal requisites of the warrant. Having used the word "houses" in the initial clause containing the general guarantee of freedom from "unreasonable searches," the Framers used a different, broader word for the second, prescriptive clause: "no Warrants shall issue [except if] . . . particularly describing *the place* to be searched" (emphasis added). Had the Framers intended to limit the "place" to the home, it would have been a simple matter for them to do so. The legislative history of the Amendment makes clear, however, that the term "place" was to have the same broad meaning as it had had in the writs of assistance. As discussed above at pp. 29-33, the writs authorized general searches of all "suspected" places, not just of houses. See Lasson, *supra*, at 54. And, indeed, the Committee of Twenty version of the Amendment (quoted in the margin at n. 41), as well as several of the state declarations upon which the Amendment was modelled,[42] used the phrase "suspected places" to describe the broad scope of protection sought. Although the final version of the Amendment omitted the adjective "suspected" there is nothing in that omission to suggest that the Framers also intended to reduce the unlimited concept of "place" to the limited confines of the home.

Second, the government overlooks the message of the early Supreme Court cases which interpreted the Fourth Amendment. In the very first case which arose under the Fourth Amendment, *Ex parte Burford*, 3 Cranch 448 (1806), Chief Justice Marshall held that the Fourth Amendment limits the government's power to arrest as well as its power to search, and requires that an arrest warrant — even if to make an arrest in a public place on probable

[42] See, *e.g.*, Virginia Declaration of Rights, Art. X (1776), (Schwartz, 235); Pennsylvania Declaration of Rights, Art. X (1776) (Schwartz, 265); Maryland Declaration of Rights, Art. XXIII (1776) (Schwartz, 282); Massachusetts Declaration of Rights, Pt. I, Art. XIV (1780) (Schwartz, 342).

cause — be supported by oath or affirmation. Plainly, this holding demonstrates that the members of the Court did not believe that the Amendment was intended to proscribe only the abuses which had arisen in connection with the writs of assistance, or only searches of homes. Surely the Justices in 1806 had better access to the Framers' intent than do government lawyers two centures later.

More significantly, in *Ex parte Jackson*, 96 U.S. 727 (1878), the next relevant case construing the protections provided by the Fourth Amendment,[43] the Court read the Framers' intent in a manner diametrically opposed to the manner proposed by the government here. Faced with the question of enforcing a statute making it unlawful to send certain items through the mail, the Court did not hesitate to announce that a search warrant would be required before a letter or sealed package could be opened, notwithstanding probable cause. Although the Court distinguished "between what is intended to be kept free from inspection, such as letters, and sealed packages . . . and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined" (96 U.S. at 733) — holding a warrant required for the former only — it explicitly rejected any distinction between sealed items in the home and in public places. It stated, "wherever they may be . . .":

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *Id.*, at 733.

[43] *Ex parte Jackson* was the fourth Supreme Court case dealing with the Amendment. The second and third cases (*Smith* v. *Maryland*, 18 How. 71 (1855), and *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272 (1855)) limited the Amendment's application to federal action and to criminal proceedings.

Thus, almost exactly one hundred years ago, this Court answered in the negative a question virtually identical to the one posed by the government in the case at bar today.

Finally, in *Boyd* v. *United States*, 116 U.S. 616 (1886), the next and most important of the nineteenth century cases interpreting the Fourth Amendment, this Court again rejected the distinction between public and private places. Although the government had at one point rightfully possessed a warehouse receipt pertaining to certain goods imported by the Boyds, Justice Bradley, writing for the Court, held that the government could not demand a copy of this quasi-public document to use as evidence in a forfeiture proceeding. Although there had been no actual search — and indeed no government officials had gone anywhere near the Boyds' home — the Court concluded that the protection provided by the Fourth Amendment was not to be so narrowly circumscribed:

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense . . .." *Id.*, at 630.

These cases, read in light of the plain language of the Amendment itself, leave no doubt that the historic intention was not to limit the protections of the Amendment to the four walls of the home.

D. *Even If The Framers Did Not Envision Modern Conditions Of Travel And Living, They Wrote An Enduring Warrant Requirement To Protect Expectations Of Privacy Which, Today, Must Embrace Personal Effects Preserved As Private Even Outside The Home.*

Notwithstanding the clear import of the historical record, and the strong evidence it contains regarding the Framers'

intent, the government argues that the protective scope of the warrant clause was intended by the Framers to be no broader than the most flagrant abuse envisioned at the time of drafting. It has not, however, offered any evidence, or even argued, that the Framers also intended to *limit* application of the warrant clause to that particular vision. Nor could it: it is "the principles and not the Framers' understanding and application of them [which] are meant to endure" (Levy, *Freedom of Speech and Press in Early American History* 309 (New York, 1960)); "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States*, 317 U.S. 349, 373 (1910). See Amsterdam, *supra*, at 399-400. Thus, even if it were assumed, against all the evidence, that the government's construction of the Framers' "intent" is historically accurate, that cannot, and does not, mean that the Framers' particular vision should be imposed on today's society.[44]

1. Because Travel And Mobility Have Come To Play A Vital Role In Today's Society, The Need To Protect The Privacy Of One's Baggage Is Now As Great As Was The Colonial Need To Protect The Privacy Of One's Home.

The Constitution was written for an eighteenth century rural society in which land ownership and concomitant rights of private property were the paramount values. See, *e.g.*, *Entick* v. *Carrington*, *supra*, at 1066. If the Framers' concerns were concentrated in the protection of the home, it was because the home was the center of their lives; and if the rights protected by the Fourth Amendment were

[44] "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken." *Weems* v. *United States*, 217 U.S. at 373.

equated with the rights of landed-private property, it was because those rights were the fulcrum of their politics. See Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945 (1977). Indeed, in colonial times travel was arduous and time-consuming (H. Bragdon, *History of a Free People* 226-27 (1969)), and, because land ownership was typical and self-sufficiency the rule, there was little need to brave the rigors of travel over unpaved roads. Thus, travel was infrequent, and those who were most likely to be found on the road were not "honest householder[s]" (Taylor, *supra*, at 39), but vagabonds, highwaymen and other shiftless persons — persons who were distrusted to begin with precisely because they did not own land. See *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972). The Elizabethan poor laws, in the form in which they were carried over to this country, represented a judgment that such persons ought not travel but should remain in one place and make an honest living. *Id.* If the Framers did not harbor a specific intent to include within the Fourth Amendment the rights of travellers to be free from warrantless searches of their locked luggage, it was because travel and the use of luggage to transport one's most private possessions played no politically significant role in their lives.

The situation in modern America is of course drastically altered. The Elizabethan poor laws and the suspicion toward travellers which they reflected — a suspicion not unnatural in a localized community where out-of-town travel was very rare — "no longer fits the facts." *Edwards* v. *California*, 314 U.S. 160, 174 (1941). Increased mobility and travel play an essential and acceptable role in today's society. While generations of colonial families remained tied to one plot of land, many in America today have no fixed dwelling, living instead in mobile homes, vans or simply carrying their belongings on their backs as they go.

It has been estimated that over a four-year period, almost 37 per cent of the population will pull up their roots, pack the contents of their homes into footlockers and bags, and transport these belongings by private or common carrier to new residences.[45] Economists have argued that increasing this mobility will strengthen our national economy by reducing structural unemployment and easing inflation. P. Samuelson, *Economics* 836 (1973 ed.). Indeed, so important is travel and mobility to modern America that this Court has recognized freedom to travel as a constitutional right. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

Thus, what may have stood alone as a pressing concern in the eighteenth century — the need to protect the privacy of one's home — has now been joined by an equally pressing concern — the need to protect the privacy of one's effects while in transit. When the American family moves its residence it carries with it — in cardboard boxes, suitcases, trunks and other portable containers — all the private personal possessions of its "home." Even on a brief trip, the travelling businessman or vacationer will transport intimate wearing apparel, checkbooks or other financial materials, a diary, correspondence and other personal papers or possibly controversial reading material — items which "touch upon intimate areas of an individual's personal affairs" and which on their face may "reveal much about a person's activities, associations, and beliefs." *California*

[45] Statistical Abstract of the United States 37 (Bureau of the Census, 1975; 96th ed.). Between 1970 and 1974, 36.9 per cent of the population moved to a different dwelling. Only 17.4 per cent of the population moved within the same Standard Metropolitan Statistical Area. *Id.*

Bankers Assn. v. *Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). And, of course, a lawyer often carries in his briefcase or larger litigation bag, locked or unlocked, private papers of the most sensitive nature.[46] Accordingly, even if, as the government urges, the Framers intended the full measure of protections of the Fourth Amendment to reach only to the boundaries of their houses, such a limited intent is plainly inappropriate to the needs of today's society in which citizens often transport in whole or in part the contents of their houses and in which the boundaries of the "home" are no longer so clearly fixed.

2. Under The Decisions Of This Court, The Fourth Amendment Warrant Protection For Personal Effects Is Conditioned, Not Upon Their Being Found In The Home, But Upon The Expectation That The Effects Will Be Kept "Private And Away From Prying Eyes."

As the government concedes, under the modern construction of the Fourth Amendment, the "maximum protection from governmental search and seizure" — the warrant requirement — is bestowed upon a particular interest when there is a "practical realization of [a] considerable expecta-

[46] The government's suggestion that there is a lesser expectation of privacy in baggage than in a home because "[f]ootlockers and other baggage carry only a fraction of a person's possessions and rarely contain personal papers" (GB 37) is absurd. While sometimes "footlockers and other baggage" may carry "only a fraction of a person's possessions," at other times they carry it all; and while sometimes "footlockers and other baggage" may contain no personal papers, at other times that is precisely what they do contain. Nor has this Court ever required a minimum number of items which must be seized or searched before a privacy interest is deemed involved: a sealed package in the mail as well as in a home is protected, regardless of how many items it contains. See, *e.g.*, *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). (See p. 51, n. 51, *infra*, for discussion of the only occasions on which a modern traveller might properly be said to have a lesser expectation of privacy in his locked luggage.)

tion of privacy" in that interest and an "intrinsic societal importance of satisfying that expectation." GB 30.[47] Plainly, this principle is not, and cannot, be limited to effects which are kept within the home. This Court has left no doubt that the protection of the Fourth Amendment "belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry* v. *Ohio*, 392 U.S. 1, 8-9 (1968). See *United States* v. *Brignoni-Ponce*, *supra*; *United States* v. *Ortiz*, *supra*; *Almeida-Sanchez* v. *United States*, *supra*. Indeed, in *Katz*, *supra*, 389 U.S. at 351, this Court squarely rejected a claim by the government — virtually identical to the one presented here — that only certain physical "areas," like the home, fall within the ambit of the warrant clause. It held the considerations underlying "the usual requirement of advance authorization by a magistrate" "do not vanish when the search in question is transferred from the setting of a home . . ." to a public place (389 U.S. at 358-359):

> "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But *what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.* See *Rios* v. *United States*, 364 U.S. 253; *Ex parte Jackson*, 96 U.S. 727, 733." (Emphasis added.) 389 U.S. at 351-352.[48]

[47] The government is forced to make this concession in order to explain why "private communications" occurring outside the home should be protected by the warrant clause since no *historical* evidence supports this concededly necessary conclusion.

Thus, recognizing the significance for Fourth Amendment purposes of whether the individual intended the subject matter to be private, Mr. Justice Rehnquist has written that the "'core' concept of privacy" and concomitant Fourth Amendment protections embrace only those "items the individual owner or possessor has chosen to keep private and away from prying eyes, either official or unofficial." *Privacy and Effective Law Enforcement*, 23 Kan. L. Rev. 1, 4 (1974).[49]

The Reasonable Expectation of Privacy in the Contents of Locked, Opaque Luggage.

The right to keep one's effects "private and away from prying eyes" may not be eroded merely by the exposure of the outer packaging in which the effects are secreted. In *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), the postal authorities had proper possession of two 12-pound packages declared by the mailer to contain coins, insured at a high value and addressed to two individuals, each under investigation for trafficking in illegal coins. Yet, despite the exposed information which virtually announced what was

[48] The Court's citation to the century-old decision in *Ex parte Jackson* is a reminder that the underlying principle of *Katz* — the refusal to limit the warrant clause to the home — was not a novel development in 1967. As noted, *supra*, at pp. 42-43, the Court in *Ex parte Jackson* had refused to distinguish between "letters and sealed packages" in and out of the home, stating that the Fourth Amendment protection extends to such items "wherever they may be." 96 U.S. at 733.

[49] Obviously, the mere desire, without appropriate action, to maintain the privacy of one's effects will not be sufficient to trigger the protections of the Amendment. If contraband or other illegal goods are left in "plain view" it is well established that such goods may be seized without a warrant — and this is true within a home as well as without. See *Harris* v. *United States*, 331 U.S. 145 (1947).

contained inside the two packages, the inner contents were off-limits until a warrant was secured:

> "The significant Fourth Amendment interest was in the privacy [of the contents] . . .; and that privacy was not disturbed or invaded [by opening the packages] until the approval of the magistrate was obtained." 397 U.S. at 253.[50]

Applying essentially the same principle, the Court in *Katz* rejected the government's argument that the petitioner had surrendered his reasonable expectation of privacy in making telephone calls by allowing himself to be "visible" through the glass portion of the phone booth. Noting that what Katz "sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear," the Court

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[50] The government futilely tries to distinguish *Van Leeuwen* from the case at bar by suggesting that *Van Leeuwen* involved "private communications . . . in a sealed container" (see GB 30-31, n. 18), even though the *Van Leeuwen* packages contained nothing but illegally imported gold coins — and even though there is no indication that the postal authorities ever even had a whisper of a belief that the packages contained letters or other forms of communication.

The *Van Leeuwen* case points up the absurdity of the government's attempt to distinguish between first-class mail, which the government concedes is protected by the Fourth Amendment in or outside the home (GB 30-31, 44, n. 18), and locked luggage which it claims loses its Fourth Amendment protection as soon as it leaves the home. The government suggests that the Fourth Amendment protection for first-class mail derives from the use of the mails to carry private communications which, according to the government's classification scheme, fall within a "core" privacy area. See GB 43-44. But in *Leeuwen* the packages *were* first-class mail and yet they carried illegal goods, *not* private communications. So, too, a locked footlocker may carry private communications despite the absence of first-class postage. The court of appeals was plainly correct when it pointed out that logically, once the warrant requirement were eliminated for baggage searches, there would be no point of rational limitation between such searches and searches of all variety of mail. See Pet. App. 18a.

held that Katz was "surely entitled to assume" that the aspect of his life that he *had* sought to preserve as private — the wagering conversations in which he had engaged — would "not be broadcast to the world." 389 U.S. at 352. "To read the Constitution more narrowly," the Court added, would be "to ignore the vital role that the public telephone has come to play in private communication." *Id.*

Surely, then, at least to the extent that the traveler "seeks to preserve [his personal effects] as private," by containing them in locked luggage, he is "entitled to assume" that he does not, merely by leaving his home, "broadcast" those effects to the world. Under the principle of *Katz* and its progeny, it is clear that whatever protection is available for effects kept or hidden within the locked home — in particular, the protection of advance judicial authorization for a search, absent exigent circumstances — should be equally available for effects kept or hidden within a locked footlocker or similarly secured luggage.

The government never faces this point squarely. Indeed, it ignores entirely the distinction between the *outer* trappings of a container carried outside the home, and the *inner* contents of that container. While carrying luggage in a public area may well eliminate one's reasonable expectation of privacy in the *outer* appearance of that luggage — which may, as it did in *Van Leeuwen* and as it did here, result in the exposure of suspicious outward data — such public carriage does *not* eliminate one's reasonable expectation of privacy in the *contents* of that luggage, especially when that luggage is securely and visibly locked.[51] Thus,

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[51] There are, of course, two exceptions which apply to luggage generally: the contents of luggage may be inspected as a condition to boarding an aircraft (see, *e.g.*, *United States* v. *Albarado*, 495 F. 2d 799 (2d Cir. 1974)), and as a condition to entering the country (see *Carroll* v. *United States*, 267 U.S. 132 (1925)). In both contexts, however, the citizen is on advance notice; the public interest in ensuring safe passage and adherence to immigration and customs laws is great; and the inspections are of a routine, noncriminal, administrative nature in which all luggage passing a particular checkpoint will be searched without an individual determination of probable cause.

even if the government were correct in its assertion that an individual "necessarily accepts" the "risk" that his luggage may be properly seized whenever he transports it outside the home (GB 45), it does not follow that by so accepting a risk of seizure the individual "diminishes his reasonable expectation of privacy" in the inner *contents* of the locked luggage.[52]

Just as Katz did not surrender his right to keep the contents of his telephone conversations private merely by exposing to view the fact that he was placing calls, and just as Van Leeuwen did not surrender his interest in the privacy of the contents of his two packages of coins merely by the fact that packages, with all their suspicious outer circumstances, were properly in the hands of the authorities, so too the individual who transports locked luggage in public does not surrender his reasonable expectation of privacy in the contents of the luggage merely because he carries it outside his home.

Nor does he relinquish his privacy interest, as the government suggests, by entrusting his luggage "to a common carrier with the consequent risk that it will be opened." GB 38. Significantly, the opinion cited by the government to support this "risk" theory, *United States* v. *Bronstein*, 521 F. 2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring), cert. den. 424 U.S. 918 (1976), acknowledges that it is unlawful for a common carrier to open personal luggage without consent. Moreover, whatever instructions may occur in the context of private carriers, such intrusions do not implicate Fourth Amendment concerns since that pro-

[52] As will be discussed below at pp. 53-58, the automobile situation (about which this Court has stated that it sees "no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant," *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970)) is distinctly different from the situation involving securely locked, opaque luggage: even *after* seizure the contents of locked luggage remain "private and away from prying eyes."

vision does not apply to searches by private parties. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). In the last analysis, there are few places, relationships, or activities that are "private" in the sense that other private individuals may not be in a position to disturb, interrupt, or disclose them. A trespasser may gain access to whispered conversations in one's own home; a burglar may enter one's offices and seize items of personal value. Were the Court to declare that such risks diminished the citizen's expectation of privacy sufficiently to allow police-initiated intrusions in all such cases, there would literally be no "reasonable" expectation of privacy left. The ambit of privacy protected by the Fourth Amendment would turn upon the fortuities of daily experience — such as the possibility of accidental breakage and consequent disclosure of the contents of one's personal luggage — and the *Katz* test would self-destruct.[53]

The Far Greater Expectation of Privacy in the Contents of Locked, Opaque Luggage than in the Automobile.

The government seeks to divert attention away from the "practical realization" that in our society there is a "considerable expectation of privacy" involved in placing one's personal effects in securely locked luggage — and that the satisfaction of that expectation has "intrinsic societal importance" because of its connection with the vital role of travel — by focussing on an analogy between luggage and the automobile. But the government's diversionary tactic

[53] The government argues further along the same lines that "express packages and moving freight of all description" should be subject to warrantless searches, because "a substantial portion of the 'freight' that law enforcement officers encounter in transit" contains descriptions of "their contents on the outside of the package both as an advertisement and as an aid in ensuring their proper handling." GB 44. The short answer to this is that the two packages in *Van Leeuwen* also contained an outer description but that did not vitiate the Fourth Amendment privacy interest which continued to inhere in the *contents* until a warrant was obtained. 397 U.S. at 254.

does not work; despite whatever similarities there may be between luggage and the automobile,[54] the *differences* are far greater — and far more relevant to Fourth Amendment concerns. Indeed, this Court has already contrasted the diminished privacy interest that attaches to an automobile with the expectation of privacy in a container used to keep one's belongings. Only two Terms ago this Court noted:

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and *it seldom serves as one's residence or as the repository of personal effects*. . . . It travels public thoroughfares where both its occupants and *its contents are in plain view*." *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (emphasis added).[55]

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[54] As the government points out (GB 39), the First Circuit noted one such similarity between "baggage or goods in transit" and automobiles:

> "Unless immobilized, such items may disappear before a warrant is obtained, and immobilization (a step which most courts, including ourselves, will permit, given cause), is arguably just as annoying to the owner as a search." (Pet. App. 17a.)

However, as discussed in the text, because there is indeed a far greater expectation of privacy in the *contents* of locked luggage than in an automobile — a factor the First Circuit did *not* take into account — an entry into and search of locked luggage, unlike an inspection of the inside of an automobile, *is* a far greater invasion of privacy than is its mere immobilization.

[55] It should be noted that despite the "lesser expectation of privacy" which is said to attach to automobiles, this Court has expressly recognized that "a search, even of an automobile, is a substantial invasion of privacy." *United States* v. *Ortiz*, 422 U.S. 891, 896 (1975).

See *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3096. Luggage, unlike the automobile, is precisely intended to be a "*repository of personal effects*"; and although luggage may "travel" in the sense that others transport or move it on public thoroughfares, rarely if ever are its contents intentionally exposed to "plain view." In sharp contrast, the interior of the automobile is continually exposed to public eyes. Here, of course, the luggage at issue was opaque and securely locked, and was never observed open by the government agents before the warrantless search.[56]

Moreover, the essential *differences* between automobiles and luggage were underscored by Mr. Chief Justice Burger last Term when he explained the basis for the lesser expectation of privacy in an automobile than in one's home or office:

> "In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 442. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order. . . .

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[56] Although in *Opperman* the glove compartment was opened by the police, the Court was careful to point out that it had been unlocked (96 S. Ct. at 3100, n. 10) and that the glove compartment "is a customary place for documents of ownership and registration" (*id.*, at 3098). Moreover, "the trunk had not been searched in [*Opperman*] *because it was locked.*" ____ U.S. at ____, 96 S. Ct. at 3102, n. 6 (Powell, J., concurring) (emphasis added).

"In the interests of public safety and as part of what the Court has called 'community caretaking functions,' *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 441, automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." *Opperman*, *supra*, ____ U.S. at ____, 96 S. Ct. at 3096.

Luggage, unlike the automobile, is not "subject to pervasiv and continuing regulation and controls, including periodic inspection and licensing requirements." Nor is it an "everyday occurrence . . . [for] police [to] stop and examine" luggage for "violations" of one sort or another and pieces of luggage are not "frequently taken into police custody" for "public safety" or "community caretaking" purposes.[57]

[57] Admittedly, luggage carried by a traveler boarding an airplane or crossing an international border is typically subject to inspection. However, such intrusions into the traveler's privacy are justified in those particular settings on the basis of vital national and safety interests. In settings in which those interests are not operative the traveler's expectation of privacy in his luggage is not diminished. Nor is the individual's expectation of privacy from *governmental* intrusion reduced because he may on occasion entrust his baggage to a common carrier with the "risk" that it may be opened. As discussed above at pp. 52-53, that "risk" does not change the individual's relationship to the government any more than a homeowner's expectation of privacy in his home is reduced because he "risks" burglary.

With the automobile, on the other hand, the possibility of police inspection exists at *all* times — except perhaps when the vehicle is parked on private property (see *Coolidge* v. *New Hampshire*, 403 U.S. at 463, n. 20) and the inside of the automobile is always exposed to public view — so that there is rarely a time when the individual can reasonably expect privacy with respect to his car.

Nor, moreover, does the fact that luggage may be comparable to the automobile in so far as it is "*easily movable*" (see GB 38) make it comparable to the automobile with respect to the expectation of *privacy*. As the government concedes, although the mobility inherent in an automobile "may frequently excuse the warrantless *seizure* of a car under the 'emergency' exception to the warrant requirement, [that mobility] is analytically *an insufficient justification* for the subsequent *search* of the car without prior judicial approval." GB 35 (emphasis on "seizure" and "search" in original). The government notes quite clearly that the justification for the search without a warrant rests squarely — and solely — on the "lesser expectation of privacy" in the automobile — a quality analytically distinct from its mobility. See GB 35-36, citing *Opperman*, *supra*, and *Cardwell* v. *Lewis*, *supra*. Thus, although the movability of luggage may, under certain circumstances, justify its detention until a warrant can be obtained (as occurred in *Van Leeuwen*), the mere fact that luggage *is* movable cannot, and does not, reduce the individual's expectation of privacy in its *contents*.

Finally, the fact of detention itself, should it occur, does not, contrary to the government's claim (GB 38-40, 48-49), change the individual's right to "preserve as private" the inner *contents* of his locked baggage. In *Van Leeuwen*, the Court specifically recognized that the "significant Fourth Amendment interest" was the privacy of the contents of the sealed packages, *after* their seizure — and detention for *29 hours* did not change that constitutional

fact. 397 U.S. at 254. Similarly, the procedure of sealing off an area until a warrant can be obtained has never been thought so to reduce the privacy interest involved as to render the warrant superfluous. See *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 461, n. 18 (unconstitutional search because automobile could have been guarded); *United States* v. *Jeffers*, 342 U.S. 48 (1951) (unconstitutional search because door to room could have been guarded).

Yet despite these precedents the government argues that once a "footlocker or suitcase . . . has been validly seized," the owner's expectation of privacy in its contents is so far diminished that a warrant is no longer required. GB 38-39. The fallacy of this argument is that it relies solely on the rationale of the "automobile search" exception — an exception, which, as noted above, finds its primary justification in the fact that automobiles are, in the first instance, less deserving of privacy protection than are homes or containers for personal belongings. Thus, while it may be that in the case of an automobile, once a seizure has occurred, "calculations of 'greater' or 'lesser' intrusions will not be demanded" (GB 39, citing *Chambers* v. *Maroney*, *supra*), and either course — immediate search or detention until a warrant can be obtained — will be permissible, in the case of *locked luggage*, which is far more deserving of privacy protection, only the warrant course is permissible.[58]

[58] The government's suggestion that immediate search should be sanctioned because it "may vindicate the owner" whose luggage contains nothing incriminating (GB 39, n. 26) misses the point. Any owner who *wishes* to "vindicate" himself and consent to a search may be allowed to do so. But to *allow* a consent search is a far cry from authorizing the law enforcement agent to conduct a search against the owner's will. See *United States* v. *Bronstein*, *supra*, cited by the government, in which the federal agents gave the defendants the choice of consenting to search of their baggage or being detained while the agents prepared an affidavit and secured a search warrant.

3. Excluding All Personal Effects Outside The Home From The Warrant Requirement Conflicts With The Reasonable Expectations Of Privacy And Fundamental Right to Travel Vital To Modern Society, Without Serving Any Legitimate Law Enforcement Interest Or Other Public Need.

Reduced to their essentials, the government's principal arguments for dispensing with the warrant as a prerequisite to conducting probable cause searches of luggage found outside the home rest upon nothing more than an unreasonable invocation of the "Framers' intent" and an inaccurate analogy to the automobile. The government claims no foundation for its proposed new rule in any important interest of those who enforce the law or of society in general.

Nor can any constitutional purpose be served by ignoring the realities and practical expectations of privacy of modern society and imposing on today's highly mobile society an obsolete intent which arose, if at all, in an age which disparaged mobility — and which will necessarily inhibit the exercise of the right to travel. See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Such an inhibition is indeed woven into the very fabric of the government's formulation. Recognizing that the individual *might* not wish to subject his chattel to warrantless search — but insisting that he "necessarily accepts" the "risk" of seizure (and, therefore, under the government's view, of search) "when he transports the chattel in public" (GB 45) — the government suggests that the individual can avoid that "risk" and preserve the privacy of his effects by exercising "control over both the kinds of belongings that he subjects to search in public and the frequency with which the police will encounter them." *Id.* In other words, according to the government, a person may preserve his privacy but only if he stays at home, or travels empty-handed: the individual must, under the government's view, *choose* between his constitutional right to privacy and his constitutional right to

travel; he may preserve one only by forfeiting the other.[59] However, while the inhibiting effects of the power the government seeks may be justified in the contexts of airport or border searches where compelling national interests are at stake and people are aware of the likelihood they will be routinely observed, they are clearly *not* costs which should be exacted in the total absence of evidence indicating that such broad-ranging, unrestrained authority is essential to the effective enforcement of vital laws.[60]

Nor is the government correct that because "the officer may eventually have to demonstrate [the "satisfaction" of the probable cause requirement] in court" (GB 44-45; see 55-56) no benefit of the warrant requirement would be lost if luggage searches were freely allowed in the first instance on the basis of the searching officer's on-the-spot determination of probable cause. Post-search review is simply not — contrary to the government's suggestion — an adequate substitute for the advance exercise of a detached judicial judgment. Such review plainly cannot operate as "the independent check upon executive discretion" which is "the time-tested means of effectuating Fourth Amendment

[59] Moreover, it cannot be overlooked that the imposition of the warrantless rule sought by the government would fall most harshly on those members of our society who are "vagabonds" or wanderers and have no fixed dwellings within which to store their belongings. Cf. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972) (suggesting that ordinances aimed at "vagabonds" raise serious questions of equal protection).

[60] The government's suggestion that the power it seeks would not be unrestrained because "[t]he scope of the search [would be] necessarily limited by the size and contours of a relatively small container and by the number of items that can be enclosed therein" (GB 45) is absurd. The rule proposed by the government would, if adopted, apply not only to the single footlocker which was seized in the case at bar, but would also apply to seizures of multiple pieces of luggage and to containers of all sizes — including those which do indeed contain *all* of a person's possessions.

rights." *United States* v. *United States District Court*, *supra*, 407 U.S. at 318-319. This Court has stated that:

> "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948).

Nor can a post-hoc review — after the search may have indeed uncovered incriminating evidence — "prevent hindsight from affecting the evaluation of the reasonableness of [the] search," at the time it occurred. *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3103 (Powell, J., concurring). See *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964).[61]

More fundamentally, the fact that "the officer may eventually have to demonstrate" probable cause in a later court proceeding as part of the criminal process does not assist the innocent citizen whose privacy is invaded by an "over-zealous" officer but who is released without further proceedings because the search uncovered no evidence of crime. The government's suggestion that the innocent citizen would be adequately protected because "an officer who acts without probable cause may be forced to answer in damages" (GB 45, n. 32) misses the point of the Amendment entirely. As the Court noted in *Chimel* v. *California*, 395 U.S. 752, 766, 767, n. 12 (1969), the Amendment is a positive restraint on government activity, "designed to

[61] Recognizing this danger, courts do, as the government itself concedes, give "greater deference . . . to findings of probable cause when a warrant has been obtained." (GB 15, citing *United States* v. *Ventresca*, 380 U.S. 102, 106 (1965); *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964). Consequently, swearing out a warrant in advance will minimize later court challenges to the legality of police conduct and will thus reduce the diversion of official resources and the clog in the criminal courts.

prevent, not simply redress," unwarranted invasions of privacy; its purpose is not to compensate victims after the fact for the harms they suffer at the hands of unrestrained government agents.[62]

II. Neither The Agents' Belief That Contraband Will Be Found Nor The Fact Of An Arrest Can Justify Eliminating The Fourth Amendment Warrant Requirement For Searches Of Locked Luggage Outside The Immediate Control Of The Arrestee And Not Conducted Contemporaneously With The Arrest.

The government presents a second argument, entitled "Even If The Court Were To Adopt a Presumptive Rule in Favor of Warrants, The Search of the Footlocker Was Reasonable." GB 46.[63] On its face, this argument would appear to assume the application of the presumptive warrant requirement to the footlocker search in this case and to require the government to try to demonstrate that the "exigencies of the situation made [the failure to seek a warrant] imperative." See *Coolidge* v. *New Hampshire*,

[62] The government's suggestion — to impose the burden of civil lawsuit on the innocent citizen — is not only an inadequate method to effectuate the purposes of the Fourth Amendment, it is also an entirely unrealistic solution. The high cost in time and money involved in bringing such actions (and the difficulty of winning damages, particularly in light of the good faith defense available to public officials; see, *e.g.*, *Pierson* v. *Ray*, 386 U.S. 547 (1967)) will certainly deter the average innocent citizen from taking that course.

[63] In what must have been an oversight, the government poses this alternative to the Court in obverse fashion, *as if there had never been a presumptive warrant requirement* all these years, and the choice now facing the Court were whether "to *adopt*" one. Actually, the choice facing the Court is whether to *reverse* the last century of Fourth Amendment law and *overrule* the presumptive warrant requirement for searches of personal property outside the home.

403 U.S. 443, 454-455 (1971). The government does not, however, here, or anywhere else, make any such effort.[64] What the government does instead is to propose that "two additional factors" — "[1] the agents' belief that the footlocker contained contraband and [2] the respondents' arrest at time of the seizure" — "*contribute to the lawfulness* of the warrantless search of the footlocker." GB 46 (emphasis added). Implicit in this formulation is the notion that these two factors, either alone or in combination, excused the agents' failure to seek a warrant — not because these factors made it difficult or even *inconvenient* for the agents to do so, but simply because these factors rendered a warrant unnecessary in the first place. Analytically, this argument is not only question-begging; it is no more than an extension of the government's primary argument: while in the first portion of its brief the government relies on its interpretation of the Framers' intent and an analogy with the automobile to justify the exclusion of baggage searches from the warrant clause, in this section the government relies on the factors of probable cause and the arrest to support the same conclusion. However, as the analysis below will demonstrate, neither the factor of probable cause, which the government considers independently (GB 47-49), nor the factors of probable cause and the arrest considered in combination (GB 49-57), provide any justification for excluding baggage searches from the presumptive warrant requirement.

[64] Indeed, as has been pointed out above, at p. 22, n. 13, the government has at no time during the entire course of this litigation ever even argued that an exigent circumstance compelled the agents to neglect the warrant requirement.

A. *Hindsight Determination Of The Contraband Contents Of Securely Locked, Opaque Luggage Cannot Justify Abdication Of The Judicial Warrant Function To The Law Enforcement Officer In The Field.*

The government argues in essence that the fact of probable cause, always considered a necessary prerequisite for *obtaining* a warrant, is at the same time a sufficient basis for *dispensing* with one. The government reaches this absurd conclusion by two separate routes, neither supported by reason.

Initially, the government argues that, given probable cause to believe that the footlocker contained contraband, it was reasonable for the agents to conduct a warrantless search because "a person can have no reasonable expectation of privacy in contraband goods." GB 47.[65] The unstated major premise to this argument is the assumption that the agents are always right — for otherwise, if the agents were wrong, and the footlocker did *not* in fact contain contraband, then the "person" *would* have had a "reasonable expectation of privacy" and the agents would

[65] The government premises this argument on the assertion that "[t]he agents had probable cause to believe that the footlocker contained *not* personal belongings or papers, but contraband" (GB 47; emphasis added). However, this assertion is entirely unsupported by the record. While the three facts cited by the government — the footlocker's "unusual weight for its size," the detector dog's positive reaction and the "leaking talcum powder" (GB 47, n. 33) — may support a belief that *some* marijuana (and some loose talcum powder) was contained in the 200-pound footlocker, these facts do *not* support a belief that the footlocker did *not* contain "personal belongings or papers." For all the agents knew or could have reasonably believed, the footlocker contained one pound of marijuana, one pound of loose talcum powder and approximately 198 pounds of personal papers and books. But, in any event, as fully set out in the text above, whether or not the agents had probable cause to believe that the footlocker contained one pound or 200 pounds of marijuana, they did not, by virtue of probable cause alone, have the right to dispense with the warrant requirement.

have acted *un*reasonably in failing to secure a warrant. A key function of the warrant requirement is, of course, to minimize the number of false positives, *i.e.*, the number of instances in which the "overzealous" law enforcement officer is *mistaken* in his assessment of probable cause. The more often the warrant requirement is eliminated, allowing the searching officer's individual field judgment to go unchecked, the more often searches will be made without probable cause. The government here asks this Court to eliminate the warrant requirement — and thereby increase the likelihood of false positives — *whenever* the agents have probable cause to believe that a piece of baggage contains contraband. But in deciding how often law enforcement officers should be allowed to be wrong, it cannot be assumed, as the government does here, that they will always be right.

Reliance on this assumption not only runs counter to the purposes of the warrant clause; it also camouflages a fallacious reasoning process. To argue, as the government does here, that the decision of the agents in this case not to seek a warrant was reasonable because the respondents had "no reasonable expectation of privacy" in the contents of the footlocker is to engage in a two-fold fallacy. First, it takes the *end results* of the search procedure — *i.e.*, the discovery of the marijuana in the footlocker — and uses those end results to justify, by hindsight, the decision which the agents made *at the inception* of the search procedure, namely, to proceed to unlock the footlocker without even bothering to seek a warrant. Second, it takes the *respondents'* knowledge that the footlocker contained marijuana, and (treating that knowledge as voiding the respondents' "expectation of privacy" in the contents) imputes that knowledge to the *agents retroactively*, to the time before the search commenced when the agents could *not* have known what was in the minds of the respondents — and indeed could have been entirely mistaken about the contents of the footlocker.

In effect, the government argues that if, prior to a search of his baggage, a citizen knows that the baggage contains marijuana, then the searching officer — who does *not* know what is in the baggage — is free to search the baggage without a warrant; or, phrased alternatively, if, as the result of a baggage search, marijuana is uncovered, then — no matter what the searching officer does know or believe in advance — the search will be deemed "reasonable" because it will be known then, after the fact, that the person had "no reasonable expectation of privacy" in the contents. Such a rule would send the Fourth Amendment to its grave: it has never been thought that the concept of "reasonable expectation of privacy" applies only when it later turns out that the search failed to uncover evidence of crime or contraband; or that "reasonableness" means that a warrant is only required when it later turns out that the searching officer was *incorrect* in his belief that contraband would be found. Surely the respondents here had no lesser "reasonable expectation of privacy" in the contents of their locked footlocker than Katz had in the contents of his telephone conversations, or than Van Leeuwen had in the contents of his two 12-pound sealed packages.[66] Yet in those cases the Fourth Amendment required a warrant before a probable cause search could be made.

[66] In its fervor to limit the plain impact of *Katz* and its progeny, the government focuses on the *type* of illegal contents contained in the footlocker here. But there is no rational distinction between the "reasonable expectation of privacy" the individual has when he transports illegally imported goods or when he transports marijuana — or, for that matter, when he engages in a thoroughly illegal conversation for which he knows he could be prosecuted and sent to prison. Indeed, despite its disclaimer (GB 47), the government's focus on the "contraband" nature of the contents involved here does resurrect the distinction between different categories of evidence put to rest by *Warden* v. *Hayden*, 387 U.S. 294 (1967). Nor is the government's claim that "a person can have no reasonable expectation of privacy in contraband goods" aided by its reference at GB 47 to the early statutes, cited by the Court in *Carroll* v. *United States*, 267 U.S. 132 (1925). Those statutes, as discussed above at pp. 36-39, do no more than regulate the searching power of customs agents; they do not eliminate Fourth Amendment protections from

The second argument offered by the government in connection with the contraband contents of the footlocker is equally fallacious. The government asserts that "since the presence of the contraband subjected the footlocker to a warrantless seizure and forfeiture, it was reasonable for the agents to conduct a search of the chattel in their lawful possession" without a warrant. GB 48. There are two ways to interpret this contention.

On the one hand, the government may mean that, because the agents had possession of marijuana, the fact that marijuana is subject to forfeiture allowed the agents to conduct a search of the footlocker freely, without a warrant. But this argument again reasons backwards from the results of the search: the *decision* to search cannot be justified by the discovery, as a result of the search, that marijuana was present.

On the other hand, the government may mean that because the agents could lawfully seize the locked footlocker without a warrant — on the basis of probable cause to believe it contained marijuana[67] — they could also lawfully search it without a warrant. This argument depends on the same assumption that the government advances as part of its earlier effort to analogize luggage with the automobile — namely, the assumption that the intrusion involved in searching the contents of locked luggage is no greater than the intrusion involved in detaining that luggage until a warrant can be obtained. As fully discussed at pp. 53-58, however, this assumption is based on a false equation between baggage and the automobile; while both may be movable and therefore properly *seizable*

situations, such as the one here, in which no international border is crossed and no exigent circumstance requires dispensing with the warrant requirement.

[67] The forfeiture statute, 21 U.S.C. § 881, cited by the government, specifically authorizes such a seizure but, as will be noted below at n. 68, it does not offer any further assistance to the government's position here.

without a warrant, the justification for *searching* the automobile, once seized, is — as the government itself specifically concedes (GB 35) — the lesser expectation of privacy in the automobile because of its peculiar exposure to police inspection and intervention, in routine administrative settings, and its peculiar design which exposes its interior to public eyes. Under the principles of *Katz* and *Van Leeuwen*, the expectation of privacy protected by the Fourth Amendment does not evaporate upon the seizure of a sealed container, or upon observation of its outer manifestations, but rather endures until the government penetrates the contents. Accordingly, the fact that the agents may have properly seized the securely locked, opaque footlocker without a warrant does not mean that they could proceed to search it without taking any steps to obtain the dispassionate approval of a neutral and detached magistrate.[68]

[68] The government's citations to the forfeiture statute and to *Cooper* v. *California*, 386 U.S. 58 (1967) (at GB 48-49), add nothing to its argument. All that the relevant provisions of the statute could authorize in a case such as this would be the seizure of a container believed to contain a controlled substance (21 U.S.C. § 881(a)(3) and (b)(4)) and — once the container were lawfully opened (by some authority *not* given in the statute) and marijuana were found inside — seizure of the marijuana (21 U.S.C. § 881(f)). As the court of appeals found, while the statute may have "reinforce[d] the agents' power to detain" the footlocker, nothing in the statute gave the agents "any greater authority to search than would exist under normal Fourth Amendment principles" (Pet. App. 19a, n. 9).

Cooper, as interpreted by this Court in *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973), and most recently in *Opperman* ___ U.S. ___, 96 S.Ct. 3092 (1976), at 3098, stands for no more than the proposition that, once properly within police custody, an automobile (which has a lesser expectation of privacy to begin with) can be searched without a warrant "to guarantee the safety of the custodians." *Cady*, 413 U.S. at 447. Moreover, the Court in *Opperman* specifically noted that the holding of *Cooper* does not depend on the possibility of forfeiture proceedings.

B. *In the Absence of Exception or Exigency, the Mere Fact of Arrest Cannot Justify Dispensing with the Warrant Requirement for Non-Contemporaneous Searches of Personal Property Outside the Immediate Control of the Arrestee.*

Logically, the most natural argument for the government to have raised in support of the agents' right to search the footlocker without a warrant would have been the established search-incident-to-arrest exception, articulated in *Chimel* v. *California*, 395 U.S. 752 (1969). Indeed, the government *did* present this argument to both courts below and the court of appeals specifically noted that it knew of "no decision of the Supreme Court . . . more relevant [than *Chimel*] to the arrest [and warrantless search] situation here" (Pet. App. 12a). However, as the record makes clear, both lower courts, applying the principle of *Chimel*, found, *on the facts*, that the footlocker was not "'within [respondent's] immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.*, at 763[69] (Pet. App. 15a, 56a).

[69] This finding is supported by at least the following facts (set out at pp. 4-6, *supra*): (1) when the arrest took place "there were numerous officers present including city policemen, railroad guards and federal agents"; (2) the arrest occurred *after* the 200-pound padlocked footlocker had already been deposited in the trunk of the parked automobile; (3) the footlocker "was far from portable, and too heavy even to be carried by the average person . . . [and] was tightly secured [with a "double locking system" (A. 41)] and could not be opened" (Pet. App. 15a); (4) when the arrest took place the automobile engine was not running and no accomplices were suspected or believed to be in the area; (5) within "less than 30" seconds after the arrest, the respondents were "frisked . . . put up against the car" and then handcuffed and immediately placed inside two government vehicles; (6) immediately after the arrest, the keys which opened the footlocker were seized from Machado's person; and (7) the government concedes that, from the moment of the arrest, the footlocker was under the agents' "control at

The government, aware that it cannot secure reversal of lower court opinions based solidly on findings of fact,[70] does not dispute the determination that the footlocker was indeed outside the "immediate control" of the respondents and that the warrantless search therefore cannot be justified under *Chimel*. Rather, it claims, as its final argument, that *Chimel* should not have been applied in the first place because the standard of "immediate control" has "little relevance" to this case. GB 14. In lieu of *Chimel*, the government offers a different — more "flexible" — standard which would allow the search of *any* "property *in the possession*" (but outside the "immediate control") of a person arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime. GB 51; see GB 53 (emphasis added).

In support of this standard the government argues that when a search following an arrest depends for its justification, not on the need to protect or preserve evidence, but instead on a "wholly different justification — probable cause to believe that evidence of crime will be found —" (GB 53), there is no need "to limit the search solely to those areas within the arrestee's immediate control." GB 54. And, the government explains, in such circumstances, when "the search is designed to uncover evidence that there is a strong reason to believe will be found," the specific justification of probable cause "provides a built-in limitation on the places and things that may be searched." *Id.*

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all times"; (8) there was no threat of danger from the contents of the footlocker; (9) the search was conducted an hour and a half after the arrest, in the federal building, a short distance from the federal courthouse; and (10) there was no evidence that it would have been impracticable, or even inconvenient, to obtain a warrant before conducting the search.

[70] The government explains its decision not to seek certiorari to review the lower court rulings that Chadwick's arrest lacked probable cause and that his post-arrest statements were illegally obtained on the basis that these questions "appear to involve the application of settled principles to particular facts." GB 5, n. 2.

The most striking aspect of this argument is that it is not new: it is virtually the same theory which undergirded the decision in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), overruled by this Court in *Chimel*, *supra*, 395 U.S. at 768. In *Rabinowitz*, the warrantless search followed immediately upon the arrest of a stamp dealer on charges relating to sale of forged stamps. The arrest took place in the dealer's one-room office — the very office from which an informant had purchased forged stamps just a few days before; and at the time of the arrest "the officers had reliable information that . . . [the dealer] probably possessed several thousand . . . [forged] stamps." 339 U.S. at 58. Although the officers had neglected to secure a search warrant, the Court never questioned that they would have been able to do so. See 339 U.S. at 59. In upholding the search, the *Rabinowitz* Court emphasized — just as the government does here — that the search was directed specifically at a specific and limited place, and was (to use the government's words here) "designed to uncover evidence that there [was] a strong reason to believe [would] be found." See GB 54. The Court stated:

> "Specificity was the mark of the search and seizure here. There was probable cause to believe that respondent was conducting his business illegally. The search was for stamps overprinted illegally, which were thought upon the most reliable information to be in the possession of and concealed by respondent in the very room where he was arrested, over which room he had immediate control and in which he had been selling such stamps unlawfully." 339 U.S. at 62-63.

Under these facts the Court held in *Rabinowitz* that the agents had the right, without a search warrant, to conduct a search contemporaneously with an arrest "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed." 339 U.S. at 61.

If *Rabinowitz* were the law today, the government's theory — permitting a warrantless search "designed to uncover evidence . . ." following an arrest — would find support in that case;[71] but this Court reversed *Rabinowitz* faced with the same theory presented by the government here.

The government tries to camouflage the fact that its theory, if adopted, would resurrect *Rabinowitz pro tanto* by characterizing *Chimel* — which overruled *Rabinowitz* — as a case directed solely against "searches not justified by probable cause" and which "bore no intrinsic relationship to the underlying arrest." GB 52. But this is a stark mischaracterization of *Chimel*. There *was* probable cause to conduct the search of Chimel's home: indeed, that fact is one of the points emphasized by Mr. Justice White in his

[71] Even under *Rabinowitz*, however, the search of the footlocker in this case would have required a warrant. *Rabinowitz* validated a *contemporaneous* search — one which occurred immediately upon the arrest of the dealer. As Mr. Justice White emphasized in his dissent in *Chimel*, the principle of allowing a search for evidence contemporaneously with an arrest assumes that

> "where it is practicable to obtain a search warrant and the search is not contemporaneous with an arrest, a warrant *must* be obtained to validate the search. This is the holding of past cases and I do not question it." 395 U.S. at 776, n. 8 (emphasis added).

Here, the search was not contemporaneous; it occurred an hour and a half after the arrest at South Station. Moreover, the government has never disputed that it would have been "practicable to obtain a search warrant." Indeed, in light of the complete security with which the footlocker and the respondents were held, the absence of any threat of danger from the contents, the apparent ease with which a warrant could have been obtained (see Pet. App. 50a) — and the failure of the government to offer any evidence refuting the practicability of obtaining a warrant — it must be assumed, for purposes of deciding this case, that it was, in fact, "practicable to obtain a search warrant." Therefore, even when measured against the contemporaneous search standard of *Rabinowitz*, the warrantless search of the footlocker in this case was invalid.

dissenting opinion. See 395 U.S. at 774-775.[72] Thus, when the Court made its decision in *Chimel*, it had before it a situation closely analogous to the one here, in which there was probable cause *both* to arrest *and* to search; and when it ruled that that search, and the previous search in *Rabinowitz*, were invalid, it did so *not* because there was no probable cause to search but because there was no *warrant* to conduct that search.

Nor can the government validly suggest that the "immediate control" test of *Chimel* should not be applied to this case because the search in *Chimel* took place in a house. The Court in *Chimel* certainly did not conceive of its analysis as limited to the interior of home or office. On the contrary, in considering the "proper extent" of the "search incident to arrest" exception, the Court specifically drew on the principles of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Sibron* v. *New York*, 392 U.S. 40 (1968) — both cases which involved confrontations between police officers and individuals *on the street*. And, more recently, in *United States* v. *Robinson*, 414 U.S. 218 (1973), at 225-226, the Court explicitly approved *Chimel* without so much as even suggesting that its concepts should be limited to the indoors.[73] See also *United States* v. *Rothman*, 492 F. 2d 1260, 1268 (9th Cir. 1973), in which the Court applied a *Chimel* analysis to a luggage search at an airport.

[72] As noted above, n. 71, although Mr. Justice White argued for upholding the warrantless search in *Chimel* as valid, incident to arrest, he specifically distinguished the kind of situation involved in this case, in which it was "practicable to obtain a search warrant" and "the search was [not] contemporaneous with [the] arrest."

[73] The only rationale the government offers for a distinction between indoor and outdoor searches is a vague allusion to a greater "historical or policy justification for a presumptive warrant requirement" in connection with the home. GB 55. As fully discussed previously however, there is neither a valid historical basis nor any policy justification for excluding personal property outside the boundaries of the "home" from full Fourth Amendment protection.

The final argument offered by the government in support of its claim that a more "flexible" standard should replace the "immediate control" test of *Chimel* is equally unavailing. Relying on *United States* v. *Robinson*, 414 U.S. 218 (1973), and *United States* v. *Edwards*, 415 U.S. 800 (1974), the government asserts that "a probable cause search of a person's belongings following his arrest in a public place is reasonable, whether or not those belongings may have been within his immediate control, because of the greatly diminished expectation of privacy following an arrest." GB 56. But *Robinson* and *Edwards* did no more than explore the parameters of the "*person* search" — the first aspect of the *Chimel* exception[74] — in light of Fourth Amendment principles. Concluding that the Fourth Amendment does permit a "full search" of the body of the arrestee (*Robinson*, 414 U.S. at 237-238 (Powell, J., concurring)), and of the "personal effects" in his "*immediate* possession" upon arrest (*Edwards*, 415 U.S. at 804-805 (emphasis added)), the Court refused to suppress cigarettes removed from the pockets of the arrestee (in *Robinson*) and clothing worn by the arrestee (in *Edwards*). But the Court did not suggest that the individual's expectation of privacy in belongings *not* on his person were in any way undermined or even implicated by its decision, or that it would be "reasonable" under the Fourth Amendment to search through *all* belongings in any way associated with or in the "possession" of the arrestee, even though not upon his person or within his "immediate possession" or within his "immediate control" at the time of arrest.

The government's essential argument here — namely, that the diminution in the expectation of privacy which an arrestee necessarily suffers in connection with his *person* justifies expanding the search to include belongings within

[74]In *Robinson*, 414 U.S. at 224, the Court, noting that *Chimel* includes "two propositions" — "that a search may be made of the *person* of the arrestee," and "that a search may be made of *the area within the control* of the arrestee" — restricted its discussion entirely to the first.

his general possession or general vicinity at the time of his arrest — is premised on the same false reasoning the government uses in connection with its argument that the seizure of a sealed container automatically wipes out the individual's expectation of privacy in its contents. Basically, at every juncture the government treats the Fourth Amendment right to privacy as a seamless web and insists that the cutting of a single strand unravels the whole. However, as fully discussed above at pp. 57-58, the intrusion involved in seizing locked luggage and detaining it while a warrant is sought does *not* eliminate the individual's Fourth Amendment right to privacy in its concealed contents.

So too here, the intrusion of an arrest does not automatically destroy the individual's Fourth Amendment right to privacy in all of the "property in his possession" (but concededly beyond his "immediate control"). In fact, in *Chimel*, the Court rejected the precise argument raised by the government here. Mr. Justice White argued in dissent that the scope of the search-incident exception should not be limited to the area strictly within the arrestee's "immediate control" because "once an arrest has been made, the additional invasion of privacy stemming from the accompanying search is 'relatively minor.'" 395 U.S. at 766, n. 12.[75] The Court's answer in *Chimel* is dispositive here:

> ". . . we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." *Id.*, at 767.

[75]Even in making this argument, Mr. Justice White indicated (as noted above, p. 72, n. 71) that the additional invasion of privacy involved in an "accompanying search" would not be tolerated without a warrant if the search was non-contemporaneous and a warrant practicable to obtain (395 U.S. at 776, n. 8) — two conditions which are indisputably met here.

Specifically declining to find that one intrusion justifies another, the Court held:

> "No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items." 395 U.S. at 766.[76]

The government has offered absolutely no reason to overrule this holding, reverse *Chimel* and go back to the discredited *Rabinowitz* standard.

In an apparent effort to make its proposal for a "flexible" standard more palatable — if not supported by reason — the government argues that an arrest provides "safeguards that justify dispensing with the need for *prior* resort to a magistrate" (GB 55, emphasis added) because the arrest ensures that a later judicial review will be held.[77] The short answer to this was given by the Court in *Chimel*:

[76] The Court did not, in *Robinson* or *Edwards*, impeach in the slightest this central principal of *Chimel*. Indeed, the Court specifically reconfirmed that "[t]he *justification* or reason for the *authority to search* incident to a lawful arrest rests . . . *on the need to disarm the suspect* in order to take him into custody . . . [and] on *the need to preserve evidence* on his person for later use at trial." *Robinson*, 414 U.S. at 234 (emphasis added). The Court's conclusion that the government need not prove "the probability in a particular arrest situation that weapons or evidence would in fact be found" in order to justify a warrantless search in that situation (*Robinson*, 414 U.S. at 235), means only that a *Chimel* search will be upheld, if within the permissible bounds, regardless of whether the arresting officer actually experiences a subjective fear or belief that the arrestee is armed or that evidence is about to be destroyed.

[77] In its primary argument the government attempts to rely on this same argument to support its claim that *probable cause alone* is sufficient protection for Fourth Amendment rights because the search officer "may eventually have to demonstrate ["satisfaction" of this requirement] in court." GB 45. This argument fails there (see pp. 60-62) as it fails here.

> "[O]ne may initially question whether all of the States in fact provide the speedy suppression procedures the dissent assumes. More fundamentally, however, we cannot accept the view that Fourth Amendment interests are vindicated so long as 'the rights of the criminal' are 'protect[ed] . . . against introduction of evidence seized without probable cause.'" 395 U.S. at 767, n. 12.

As fully discussed above at pp. 60-62 exclusive reliance on post-search review seriously undermines, if it does not destroy, the prophylactic aspects of the Fourth Amendment. Without the *advance* interposition of a neutral decision maker, there is an increased risk of improperly exercised discretion, hindsight coloration of the facts and untold numbers of fruitless searches which will never be scrutinized by the judiciary.[78]

Conclusion.

In seeking reversal of both lower court decisions invalidating the warrantless search of the locked footlocker, the government offers no evidence or argument of exigency or law enforcement need to justify such a result. Indeed, the government barely deals with the facts of the case and implicitly concedes that it cannot prevail on these facts

[78] Nor does the government's suggestion that searches incident to arrest may be *preferable* to "warrantless searches not accompanying an arrest" which are "not promptly accounted for to a judicial officer" (GB 55) provide a sufficient justification for eliminating the warrant requirement whenever an arrest occurs. That the individual's Fourth Amendment rights may be *more* protected when the warrantless search of his belongings occurs incidental to his arrest than when the search occurs without his arrest (and perhaps without his even knowing that it has occurred) does not mean that his important Fourth Amendment rights would not be more adequately protected still if the search were done pursuant to the requirements of the warrant clause.

without overturning existing precedent. Accordingly, it calls upon this Court to authorize a broad new expansion of the searching power which would relieve the agents in this case of their warrant obligations. Under the government's proposed rule, a warrant would no longer be required for probable cause searches except for those occurring within the home or office or involving private communications via telephone or first-class mail. No reason offered by the government, however, justifies the drastic, gratuitous change in Fourth Amendment law it seeks, and neither history nor decisional law support its claims. On the contrary, the principles of *Katz* and its progeny, and this Court's clear commitment to maintaining the warrant requirement for all probable cause searches in the criminal context in order to protect "the individual's legitimate expectation of privacy against the overzealous police officer," plainly mandate that the lower court opinions be upheld.

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IN THE

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No. 75-1721

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOSEPH A. CHADWICK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, *AMICI CURIAE*

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1721

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH A. CHADWICK, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICI CURIAE

Interest of Amici[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members, dedicated solely to defending the principles embodied in the Bill of Rights to the Constitution. The Civil Liberties Union of Massachusetts is the

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1. Letters of Consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

Massachusetts State affiliate of the American Civil Liberties Union.

Central among the protections of the Bill of Rights are the safeguards of privacy set forth in the Fourth Amendment. That Amendment erects a critical barrier between the government and the citizens, with well-defined procedures and standards which the government must follow whenever it seeks to intrude upon the "right of the people to be secure in their persons, houses, papers, and effects. . . ."

In recent years, the Fourth Amendment's barrier has, regrettably, been lowered considerably. The ACLU has repeatedly urged the Court to resist such "hydraulic pressures" to weaken the right of privacy which Mr. Justice Douglas warned against in Terry v. Ohio, 392 U.S. 1, 39 (1968). Now, once again, an assault on the Fourth Amendment is being made, this time in an effort to limit the warrant requirement to searches of homes, offices and private communications, turning it into the exception rather than the rule. We submit that the values protected by the Fourth Amendment require the rejection of this most recent effort to render the right of privacy largely meaningless.

Statement of the Case

This case involves the warrantless search of a 200-pound double-locked footlocker, resulting in the discovery of a large quantity of marijuana. The district court granted respondents' motions to suppress, ruling that the warrantless search of the footlocker fell within neither the automobile nor the search incident to an arrest exceptions to the warrant requirements. The Court of Appeals affirmed the suppression of the marijuana, holding that the search of the footlocker could not be justified as a valid search incident to arrest. It declined to create a new "luggage" exception to the warrant requirement.

Summary of Argument

Under established Fourth Amendment principles, a locked trunk or other closed container is fully protected by the warrant requirement. Law enforcement officers may not conduct a search of the contents without a warrant, irrespective of where the trunk or container is found.

The owner of an opaque, double-locked trunk has a justifiable expectation that the contents will remain private and unexposed, even in publicly accessible areas. United States v. Van Leeuwen, 397 U.S. 249 (1970); Katz v. United States, 389 U.S. 347 (1967); Ex Parte Jackson, 96 U.S. 727 (1878).

The Fourth Amendment requires that a disinterested judicial officer determine that there is probable cause to conduct a search and the permissible scope of the search. It precludes reliance on the judgment of law enforcement officers. United States v. United States District Court, 407 U.S. 297 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Camara v. Municipal Court; 387 U.S. 523 (1971); Johnson v. United States, 333 U.S. 10 (1948). Post-search review is not an adequate substitute for prior judicial determination. United States v. United States District Court, supra; Coolidge v. New Hampshire, supra; Beck v. Ohio, 379 U.S. 89 (1964).

There are no exigent circumstances requiring the creation of an exception to the warrant requirement for locked trunks and closed containers. Adherence to the warrant procedure would not frustrate the achievement of any legitimate governmental purpose for measures to maintain the status quo pending the application for a search warrant are readily available. Moreover, such measures are constitutionally required, for temporary control over trunks and closed containers is less intrusive of individual privacy than search of their contents. United States v. Van Leeuwen, supra; Coolidge v. New Hampshire, supra; United States v. Jeffers, 342 U.S.

48 (1951); Taylor v. United States, 286 U.S. 1 (1932).

The factors and conditions which have been used to justify warrantless automobile searches are inapplicable to locked, opaque trunks and other closed containers. Even if automobiles can be considered analogous to locked trunks and closed containers, the automobile search exception does not apply to searches of automobiles where there is no possibility of removal or tampering. Coolidge v. New Hampshire, supra.

Finally, a 200-pound double-locked footlocker, several feet away from the arrestee, over which law enforcement agents have control, having seized the keys, is not within the immediate control of the arrestee. A search of an area from which weapons or destructible evidence can not be obtained is not a valid search incident to an arrest. Chimel v. California, 395 U.S. 752 (1969). The same test of "immediate control" applies whether the item seized and searched is located in a building or out of doors. Coolidge v. New Hampshire, supra; Chimel v. California, supra. The broader definition of "area of control" for which the Government argues has been expressly rejected as unsound. Chimel v. California, supra.

ARGUMENT

Introduction

The interests protected by the Fourth Amendment are squarely involved in this case and severely jeopardized by the Government's assertions. The essential purpose of the Fourth Amendment, as recognized in countless decisions of this Court, is "to maintain inviolate"[2] the privacy and security of individuals. See, e.g., United States v. Ortiz, 422 U.S. 891, 895 (1975); Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Boyd v. United States, 116 U.S. 616, 630 (1886). This protection of individual privacy is basic to a free society and one of the unique values of our constitutional democracy. McDonald v. United States, 335 U.S. 451, 453 (1948). The protections afforded by the Fourth Amendment apply to people wherever they harbor a justifiable expectation of privacy, Katz v. United States, 389 U.S. 347 (1967), and the prohibitions of the Fourth Amendment act as a bar to all governmental invasions of that privacy. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968); Boyd v. United States, supra at 630.

Whenever governmental officers seek to intrude upon individual privacy, the Fourth Amendment embodies a set of well-defined procedures and standards which must be followed. The cornerstone of this scheme is the warrant requirement, for "the most basic constitutional rule in this area is that '...searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable....'" Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971) (quoting from Katz v. United States, supra at 357).

The issues in this case must be addressed with these principles in mind.

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2. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

THE WARRANTLESS OPENING OF LOCKED PERSONAL PROPERTY VIOLATES THE FOURTH AMENDMENT.

Under established principles of Fourth Amendment jurisprudence, a locked trunk or other closed container is fully protected by the warrant requirement. So long as the owner reasonably expects the contents to remain unexposed, police officers may not conduct a search of those contents without a warrant, irrespective of where the trunk or container is found.

A. There is a justifiable expectation of privacy in locked trunks and closed containers, wherever found, which is protected by the Fourth Amendment.

The Fourth Amendment embodies a concept of personal privacy the scope of which extends to all items which an individual justifiably expects will be shielded from public view. As Justice Rehnquist has written, the protection encompasses "items the individual owner or possessor has chosen to keep private and away from prying eyes, either official or unofficial." Rehnquist, "Privacy and Effective Law Enforcement," 23 Kansas L. Rev. 1, 4 (1974). Thus, the reasonable expectation of the owner or possessor is a key factor in determining the applicability of Fourth Amendment protections.

In Katz v. United States, supra, this Court held that an individual in a closed, public phone booth was entitled to the full panoply of Fourth Amendment protections. The Court rejected an analysis limiting the scope of constitutional privacy to "protected areas," holding that it was the intention of the individual that triggered Fourth Amendment protection:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home

> or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. (Footnotes omitted). Katz v. United States, supra at 351.

The reasonable expectation of privacy analysis has been consistently applied to closed packages and containers for nearly 100 years. In Ex Parte Jackson, 96 U.S. 727 (1878), the Court found unconstitutional a warrantless search of first class mail. Because the sender had sealed papers inside an opaque container, he expected those papers to be shielded from public view, and Fourth Amendment protections were fully applicable.

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domicils. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. 96 U.S. at 733.

A century later the same rationale was applied in United States v. Van Leeuwen, 397 U.S. 249 (1970), where a unanimous Court found that a sealed, first class mail package marked "COINS" deserved full Fourth Amendment protection. The sender's interest was in the privacy of the contents of the package. Despite the clear marking on the outside of that package, any government intrusion into the expected area of privacy within the package was forbidden without a search warrant. 397 U.S. at 253.

For the same reasons, an individual who places

his personal effects inside an opaque trunk and double locks that trunk has a justifiable expectation that the contents will remain private. Closed against official or unofficial inspection, the contents are protected regardless of the fact that the trunk is located in a publicly accessible area. This conclusion is compelled by the holding in Katz v. United States, supra.

The Government seeks to avoid this conclusion by contending that Katz, supra, Ex Parte Jackson, supra, and Van Leeuwen, supra, stand for the proposition that only private communications[3] via telephone and first class mail are within the scope of privacy protected by the Fourth Amendment. But there is nothing in any of these cases to indicate that the Court contemplated such a severe limitation. Indeed, it would be nonsensical to find, as the Government theory implies, that an individual's privacy interest in a sealed package is secure only when that package is in the hands of federal employees, i.e. postal officers. See, e.g., Ex Parte Jackson, supra. The individual on his way to or from the post office, and the individual who delivers his own package or sends it via a private carrier, should both be accorded full Fourth Amendment protection.

A theory that the Fourth Amendment only protects private communications cannot possibly explain the Court's unanimous decision in Van Leeuwen, supra. No communications of any sort, written or oral, were involved as the package clearly indicated

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3. Although the Government in this case takes the position that private communications are within the "core" of privacy protected by the Fourth Amendment, in United States v. Ramsey, No. 76-167, the Government has taken a contrary position that there is no privacy interest in international communications and that such communications may be searched absent a warrant, probable cause or even reasonable suspicion.

it contained only coins. A warrantless search was forbidden because the sender expected the contents to remain unexposed.

The Government's position would leave the individual secure in his personal belongings only when he is within a home or office. This is a position that this Court has resolutely rejected by holding that the Fourth Amendment "belongs as much to the citizen on the streets of our cities as to the home owner closeted in his study to dispose of his secret affairs." Terry v. Ohio, supra at 8-9 (1968). Moreover, such a narrow definition of privacy is totally unworkable in a vibrant, mobile society. Our citizens are constantly making trips which require the movement of personal belongings. If the individual has a reasonable expectation of privacy only in his home, his right to move about in society becomes severely limited.[4] Moving from one home to another, or from home to office, would entail a serious surrender of privacy.[5]

The Government concedes that probable cause is required to search the contents of locked trunks and closed containers, in effect conceding that the owner has a justifiable expectation of privacy in

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4. The right to travel has been accorded constitutional status by this Court. See Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966).

5. Restrictions on outdoor privacy would also discriminate against those who have no fixed dwelling. The nonconformists in America who live in mobile homes, who live in cars, or who simply carry all their belongings with them, deserve the same personal privacy with respect to papers and effects as do more conventional citizens. See Papachristou v. City of Jacksonville, 405 U.S. 156, 163-64, 170 (1972).

these belongings. Petitioner would, however, separate the probable cause requirement of the Warrant Clause from the procedure for judicially predetermining the existence of probable cause. Amici submit that the two are inseparable for probable cause means judicially determined probable cause. Deviation from the warrant requirement may be excused only upon a convincing showing that warrantless search is imperative.

B. The Fourth Amendment requires prior judicial determination of probable cause and the scope of search.

Though it is now "axiomatic" that the warrant is paramount in the protection of individual privacy, Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973)(Powell, J. concurring), the Government seeks to eliminate the warrant requirement in all searches conducted outside the home or office. But the Warrant Clause "touches the very heart" of the Fourth Amendment, United States v. United States District Court, 407 U.S. 297, 316 (1972), and without its protections, individual privacy is jeopardized.

1. Authorization of the search

While conceding that probable cause is required to search personal property, it is the Government's position that the law enforcement officer's determination of probable cause is sufficient protection against the initiation of unreasonable searches. Amici submit that the purpose of the warrant requirement and the decisions of this Court construing and applying it eschew reliance on executive determination of probable cause and firmly establish that the essence of the Fourth Amendment's protection against unreasonable searches lies in the determination of probable cause by a neutral, judicial official.

The reason for the rule requiring adherence

to judicial process emerges from the purpose of the Fourth Amendment. It prohibits governmental breach of individual privacy absent a showing of compelling public necessity expressed in terms of "probable cause." Probable cause is an objective standard which requires a careful, dispassionate evaluation of the available facts which make the proposed official action reasonable.

The duty and responsibility of executive officials is to enforce the law by investigating and prosecuting those suspected of unlawful acts. Because of the nature of these responsibilities, officers have a subjective interest in obtaining evidence. They are likely, due to the ineluctable pressures of their duties, to overestimate the necessity for search and undervalue the individual's privacy interest. Consequently, it is inappropriate to rely upon them to make the careful, objective determination of probable cause required by the Fourth Amendment.

Even English law predating the Constitution proclaimed that "it is not fit that the receiving or judging of the information should be left to the discretion of the officer." Leach v. Three of the King's Messengers, 19 How. St. Tr. 1001, 1027 (1765). Similarly, this Court has repeatedly recognized that security against unlawful searches cannot be maintained by reliance on the judgment of officials engaged in the competitive enterprise of the pursuit of crime. E.g., Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

Thus, the chief function of the warrant requirement is to take the determination of the existence of probable cause for the initiation of a search out of the hands of law enforcement officials and place it in the hands of an objective, neutral party -- a judicial officer. This Court has consistently and unwaiveringly recognized that the essence of the protection afforded by the Fourth Amendment lies in this requirement of prior

determination of probable cause by a disinterested magistrate. E.g., United States v. United States District Court, supra; Katz v. United States, supra; Camara v. Municipal Court, supra at 528-529, 533-34; Johnson v. United States, supra. Never has the determination of probable cause by an executive officer been deemed to provide adequate protection.

In United States v. United States District Court, supra, this Court emphasized the importance of prior judicial determination by holding that a search authorized by the President undertaken for the purpose of safeguarding national security cannot go forward absent a warrant issued by a judicial officer. As the Court stated: "The Fourth Amendment contemplates a prior judicial judgment [of reasonableness], not the risk that executive discretion may be reasonably exercised" because "executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy." 407 U.S. at 317. (Footnote omitted.) The same lack of neutrality has been found fatal to a search warrant issued by a state attorney general in his capacity as a justice of the peace. In Coolidge v. New Hampshire, supra at 450, the Court reemphasized that "the whole point of the basic rule [requiring judicial determination that a search is justified]... is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations -- the 'competitive enterprise' that must rightly engage their single-minded attention." (Footnote omitted.)

Only this Term, the Court repeated that the Fourth Amendment is violated whenever the determination of probable cause is made by an interested party. In Connally v. Georgia, 45 U.S.L.W. 3461 (U.S. Jan. 11, 1977), the Court held that a search pursuant to a warrant issued by a justice of the peace who had a pecuniary interest in its issuance violated the Fourth Amendment.

The warrant requirement may also serve to an-

nounce the officer's authority to search, the need to search, and the limits of the power to search. See Camara v. Municipal Court, supra at 532. Although in the instant case, the officers did not seize the footlocker until it had been claimed by its owner, the principle which the government urges would have a broader application. It would apply to freight delivered to a carrier for transportation. For instance, it would have applied had respondents shipped the footlocker to Boston without accompanying it. In such circumstances, a warrant would serve the valuable function of informing the third-party carrier of the agent's authority. See, e.g., United States v. Van Leeuwen, supra; United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974); United States v. Garay, 477 F.2d 1306 (5th Cir. 1973).

2. Scope of the search

In addition to limiting the initiation of intrusions on privacy, the warrant requirement serves the separate and distinct function of confining within precise limits those searches found to be necessary. Here, the issue is preventing an otherwise permissible intrusion from degenerating into an indiscriminate rummaging through a person's belongings. See, e.g., Coolidge v. New Hampshire, supra at 467; Marron v. United States, 275 U.S. 192, 196 (1927). The Government contends that there is no danger of a wide-ranging search outside the home because only small containers with few items would be subject to search. Brief for Petitioner at 45.

There is absolutely no basis for this assertion. Huge trunks, boxes, and metal containers of all types are available for the transportation of personal effects. Indeed, when an individual changes his residence, he places all his personal belongings in containers for out-of-doors transportation. Thus, any single trunk or container may contain a multiplicity of personal effects. Moreover, any single container may contain other closed

or locked containers. Wherever such a large assortment of personal belongings potentially encompassed in additional closed containers can be found, there is a danger of the wide-ranging, indiscriminate search which the warrant requirement is designed to prevent.

This case illustrates the fallacy of the Government's argument that a warrant is not necessary to limit the scope of the search of closed containers. The 200-pound footlocker could easily have contained all of the owner's worldly goods.[6] Moreover, the agents did not limit the scope of their search to the container for which they had probable cause; they extended it to include additional closed containers, two suitcases, for which they concededly did not have probable cause to search.

3. Inadequacy of the alternatives

The Government recognizes that, on occasion, law enforcement officers will err in their evaluation of probable cause. In these instances, the Government contends, adequate substitutes for the warrant requirement are provided by post-search judicial review and individual damage actions against the offending officers. This argument, however, ignores one of the fundamental purposes of the warrant requirement -- the prevention of unjustified intrusions upon the privacy of citizens. Chimel v. California, 395 U.S. 752, 767 n.12 (1969). In the first instance, "the magistrate's scrutiny is intended to eliminate altogether

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6. That it contained marijuana is irrelevant, for the agents did not know that until after they searched it. Giving weight to this fact in effect would justify the search by what is turned up, an analysis this Court has steadfastly refused to accept. See, e.g., Sibron v. New York, 392 U.S. 40, 63 (1968); Henry v. United States, 361 U.S. 98, 103 (1959).

searches not based on probable cause. The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity." Coolidge v. New Hampshire, supra at 467.

Even ignoring the preventive function which the warrant requirement is designed to serve, the Government's proposed alternatives are still not adequate substitutes for the warrant requirement. This Court has repeatedly recognized that post-search judicial review is not an acceptable substitute for a neutral predetermination of probable cause. See, e.g., United States v. United States District Court, supra; Katz v. United States, supra. An after-the-fact examination of the circumstances leading to a warrantless search is inherently less reliable than an objective predetermination.

Since the Government seeks broad power to search private property found anywhere outside the home, it is possible the search may occur in the absence of the owner. In such a case, the officer's recollections of the basis for his actions cannot be tested, for he may be the only witness to the search. Also, all too often, post-search hearings are "likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964).

Moreover, post-search review, inadequate as it is, can never cure or provide redress for unconstitutional searches that reveal no evidence of crime. The exclusionary rule provides no remedy for the law-abiding citizen who is the victim of an unjustified intrusion into privacy. To this the Government's only answer is that such a person would be adequately protected because "an officer who acts without probable cause may be forced to answer in damages." Brief for Petitioner at 45 n.32. The Fourth Amendment is a positive restraint on government the enforcement of which should not turn on

the ability and desire of individuals to involve themselves in expensive and time-consuming litigation. The protection of constitutional rights is not and should not be the task of the citizen. Cf., Blount v. Rizzi, 400 U.S. 410 (1971); Freedman v. Maryland, 380 U.S. 51 (1965). The Fourth Amendment puts the burden on the government.

In sum, the best protection of privacy, especially for the poor and unsophisticated who are unlikely to sue public officials, is a pre-search determination of probable cause by a neutral magistrate.

In effect, the Government contends simply that the initiation and scope of the search of closed containers should be determined by the police officer on the beat, subject only to the good faith exercise of his discretion in determining the existence of probable cause and the permissible scope of search. However, this Court has consistently refused to make good faith the measure of the Fourth Amendment. "[S]imple 'good faith on the part of the arresting [or searching] officer is not enough.' ...If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police." Terry v. Ohio, supra at 22.

The purpose of the rule requiring prior judicial authorization for search is to provide a check on the exercise of official discretion. Whenever a police officer selects an object for search he is exercising discretion and, where feasible, the Fourth Amendment requires that he obtain pre-search judicial review of the reasonableness of his action.

C. There is no justification for creation of an exception to the warrant requirement for closed containers.

The warrant requirement is subject to a 'few

specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption...that the exigencies of the situation made that course imperative.'" Coolidge v. New Hampshire, supra at 455 (footnotes omitted). Recognizing that none of the established exceptions applies to the search in this case, the Government urges this Court to create new exceptions. In order to justify the creation of an exception to the warrant requirement, it is necessary for the Government to establish, at the very least, that the warrant procedure would frustrate the purpose behind the search. E.g., United States v. United States District Court, supra at 315; Camara v. Municipal Court, supra at 533. Amici submit that subjecting the search of closed containers located in public places to the warrant requirement would not frustrate any legitimate governmental interest.

1. Adherence to the warrant requirement would not frustrate the governmental purpose in searching closed containers.

The question here is whether the warrant requirement would frustrate the governmental purpose justifying the search either because a search would not be possible if not performed immediately or because a delayed search would not effectuate the intended purpose. Applying this test, the sole circumstance which purportedly justifies dispensing with the warrant requirement for searches of closed containers located in public places is their mobility -- that they could be removed or tampered with before a warrant could be obtained.

But there are a variety of ways in which closed containers may be immobilized, preserving the status quo, until a search warrant may be obtained. This Court has, on a number of occasions, accommodated law enforcement interests by permitting po-

lice officers to exercise control temporarily over closed containers and areas until a search warrant may be obtained. This procedure adequately satisfies the governmental need without completely dispensing with the vital constitutional shield of a search warrant.

For example, in Taylor v. United States, 286 U.S. 1 (1932), a unanimous Court found unconstitutional a warrantless probable cause search of a garage located on private property. The Court ruled that the police had ample opportunity to obtain a warrant without any risk to the evidence within the garage because officers could stand guard at the site to prevent tampering. Accord, United States v. Jeffers, 342 U.S. 48 (1951). The rationale which underlies the rule permitting temporary police control over private premises is that it is the least intrusive means of protecting evidence without a complete invasion of privacy. The greater intrusion by government officials, the actual search of papers and effects, is forbidden in the absence of a search warrant.

The temporary control approach is equally applicable to movable items such as vehicles and closed containers. Police may place a twenty-four-hour guard on an automobile in order to prevent removal, but they may not search without a warrant. Coolidge v. New Hampshire, supra. Likewise, a closed container concealing personal property may be temporarily held pending application for a warrant. United States v. Van Leeuwen, supra. Postal authorities, acting on probable cause, detained a package labeled "COINS" for 29 hours while a search warrant was sought. The Court approved this procedure, finding that the package owner's significant Fourth Amendment interest was in the privacy of the contents. Accordingly, detention was constitutional, although a warrantless search would not have been.

Thus, this Court has recognized that potential mobility alone does not justify a warrantless search.

Rather, it has insisted that protection from the removal or destruction of evidence must be pursued by police action to preserve the status quo pending the application for a search warrant. Through this procedure, the governmental purpose in undertaking a search will not be frustrated.

Despite the recognition that immobilization of chattel until a warrant is obtained is the minimally constitutional course, the Government argues, relying on Chambers v. Maroney, 399 U.S. 42 (1970), that a full search of the contents of a container is as reasonable as a temporary detention or seizure.

To reach this conclusion, the Government further contends that locked trunks are analogous to automobiles for Fourth Amendment purposes. The automobile exception to the warrant requirement, however, has been carefully developed and specifically limited, and its rationale is totally inapplicable to a locked trunk or other closed container.

The rationale for the exception is twofold. It stems from the inherent mobility of an automobile, creating circumstances in which, as a practical necessity, police application for a warrant might enable a suspect or accomplice to remove evidence. For example, the officers in Carroll v. United States, 267 U.S. 132 (1925), stopped defendants' car on a highway with probable cause to search but without making any initial arrests. In those circumstances, the officers could not leave the scene to obtain a warrant, 267 U.S. at 159, and an on-the-spot search was held to be constitutionally valid. The Court has held that an additional reason for permitting warrantless automobile searches is that the pervasive state regulation of vehicles and the public exposure of the inside of the auto through the windows limit the driver's expectation of privacy. South Dakota v. Opperman, 96 S.Ct. 3092, 3095-96 (1976).

Where an on-the-spot search is valid under Carroll, supra, but where conditions at the scene

of the initial seizure would make a search dangerous or difficult, this Court has indicated that the police may transport the automobile back to the stationhouse and then proceed with the search. Chambers v. Maroney, supra; Texas v. White, 423 U.S. 78 (1975)(per curiam). Once a right to search at the scene exists, that right does not disappear simply because of a police practice designed to protect officers and the suspect's property. The warrantless stationhouse search in Chambers, supra, was constitutionally valid only because of the officers' power to search at the scene of the original seizure. Texas v. White, supra.

But the Chambers Court did not, as the Government suggests, provide a basis for a repeal of the warrant requirement in all out-of-doors searches. The holding was carefully limited to those situations in which an initial search was permissible. Far from offering a rationale to justify all warrantless, probable cause searches, the Court refused even to find that automobile searches were totally immune from the warrant requirement:

> Neither Carroll, supra, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. Chambers v. Maroney, supra at 50.

The Court did not deviate from the established Fourth Amendment principle that warrantless searches are presumptively unreasonable. "Every word in the opinion indicates the Court's adherence to the underlying rule and its care in delineating a limited exception." Coolidge v. New Hampshire, supra at 479.

One of the limitations to the automobile exception was clarified in Coolidge, supra, where the Court held unconstitutional a probable cause search

of defendant's automobile. The Court found that, at the time of the initial seizure of the automobile in defendant's driveway, there were not exigent circumstances to allow the police to search without a warrant. Defendant was in custody and his automobile was guarded against tampering. Though the car was still technically mobile, the Court refused to attach any constitutional significance to the simple fact of mobility since, with the guard, there was no chance of removal. 403 U.S. at 461 n.18. Chambers, supra, was found inapplicable since it held that "where the police may stop and search an automobile under Carroll, they may also seize it and search it later at the police station." Id. at 463 (footnote omitted).

The complete inappropriateness of the automobile exception to this case is made clear by an examination of the second rationale for the exception: the limited expectation of privacy. There obviously could be no state regulation of trunks that would result in noncriminal examination and inspection of the sort required for automobiles. The owner of a trunk can confidently and reasonably assume that his locked container will not be subject to the safety or licensing laws applicable to moving vehicles. Cf., South Dakota v. Opperman, supra. The owner of the trunk can be certain, by choosing an opaque container protected by a lock, that the contents will not be exposed to the public. The automobile owner does not have this choice; the glass windows of his car serve to reduce his ability to limit public exposure.

Finally, the primary function of the automobile is transportation. It "seldom" serves as a "repository of personal effects." Cardwell v. Lewis, 417 U.S. 583, 590 (1974). In sharp contrast, the primary and only function of a locked trunk is to serve as a secure repository of personal effects.

It is apparent that requiring adherence to the warrant requirement in situations where warrantless temporary detentions are permissible would not in

any way frustrate the legitimate law enforcement objectives of the police. There is no danger that the evidence would disappear. Moreover, the warrant requirement does not impose any insuperable impediment to effective law enforcement since the authority to undertake warrantless searches is no greater than the authority to search with a warrant. Facts amounting to probable cause for a warrantless search will always justify the issuance of a warrant. There is no burden on the state to meet this requirement except the inconvenience to the officers and the delay necessary to prepare the papers and present the evidence. Johnson v. United States, supra at 15. Inconvenience can never be the measure of the duty to obtain a search warrant.

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefits of a written Constitution and undermine the bases of our Government. Reid v. Covert, 354 U.S. 1, 14 (1957).

2. The warrantless search of respondents' trunk cannot be justified as a valid search incident to arrest.

The search of respondents' 200-pound, double-locked footlocker, which federal agents had not seen opened, was constitutionally broader than a permissible search incident to arrest. Recognizing this the Government contends that a broad "area of control" standard should be adopted for the search of personal belongings located outside the home. This approach is inconsistent with the rationale of the search incident to arrest exception and at odds with many rulings of this Court.

The warrantless search incident to arrest is justified by the inherent necessities of the situation at the time of arrest. The arresting officer is permitted

a limited search to prevent access to weapons and destructible evidence. Chimel v. California, supra. This general exception to the warrant provision involves two distinct branches: search of the person of the arrestee and search of the area within the immediate control of the arrestee. United States v. Robinson, 414 U.S. 218, 225 (1973). The latter search is, by definition, limited to a search of the area "into which an arrestee might reach . . . . the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, supra at 763.

A double-locked trunk several feet away from the arrestee, which the officers had never seen opened and which they had control over, having seized the keys, cannot be within the area so defined. The facts indisputably establish that there was no danger whatever that the arrestees could have reached into the locked footlocker, and the Government has offered no plausible basis for making this assumption.

The Government's broad test of "area of control" is identical to that applied by the Court in United States v. Rabinowitz, 339 U.S. 56 (1950) and Harris v. United States, 331 U.S. 145, 164 (1947). But both of these cases were expressly overruled as unsound in Chimel v. California, supra. Thus, for constitutional purposes, an arrestee is in possession only of those items on his person or within his immediate control. Searches into closed drawers and containers beyond the reach of the arrestee, as in this case, may be made only under authority of a warrant. Chimel v. California, supra at 763.

The Government attempts to distinguish Chimel, supra, on the grounds that the agents in the instant case had probable cause both to arrest the defendants and to suspect that the trunk contained contraband, and that the trunk was found outside the home. Brief for Petitioner at 57. In these circumstances, the Government would place no limitation on the agents' right to search; all of an arrestee's possessions, regardless of their proximity to the

place of arrest, would be subject to warrantless, probable cause search.

This Court has not signaled any retreat from Chimel and has not restricted its application to indoor searches. Chimel has been cited with approval in situations not involving a search of a dwelling, see e.g., United States v. Robinson, supra at 225-26, and lower courts have readily assumed its applicability to all arrest situations. See, e.g. United States v. Rothman, 492 F.2d 1260, 1265-66 (9th Cir. 1973); United States v. Colbert, 454 F.2d 801 (5th Cir. 1972), rev'd on other grounds, 474 F.2d 174 (1973) (en banc).

Indeed this Court has, when reviewing similar factual situations, rejected the Government position. The police in Coolidge v. New Hampshire, supra, had probable cause both to arrest and to search, yet the Court refused to allow a search of personal effects found outside the home. 403 U.S. at 473. The Court indicated that "[t]here can be no question that after Chimel such a search could not be justified as 'incident' to the arrest. . . ." 403 U.S. 457 n. 11. Since Chimel applied only prospectively, however, Coolidge v. New Hampshire, supra, was decided under pre-Chimel law and applied the broader area of control doctrine of United States v. Rabinowitz, supra. That is, Coolidge applied the precise standard for which the Government here contends and the search nonetheless was found unconstitutional.

The Chimel court explicitly answered the Government's indoor-outdoor distinction:

> No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items. The only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other. 395 U.S. at 766 (footnotes omitted).

Chimel's limitation on the scope of a search incident to arrest cannot be overcome by arbitrary distinctions that have no constitutional significance.[7] As the Court in Chimel recognized, there is "no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." 395 U.S. at 766 n. 12. Inasmuch as the footlocker was not within the area from which a weapon or evidence could be obtained, the warrantless search cannot be justified as a valid search incident to arrest.

D. The history of this Court's Fourth Amendment jurisprudence requires adherence to the warrant requirement.

For its argument that warrantless searches are not per se unreasonable under the Fourth Amendment, the Government relies on its reading of the history which led to the Amendment's adoption.[8] What the Government ignores is the 100 years of this Court's Fourth Amendment jurisprudence construing and applying the rights guaranteed. Amici submit that the

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7. It should be noted that the arrest was warrantless and it was the probable cause to believe the footlocker contained contraband which provided the basis for the arrest. In terms of the Fourth Amendment's warrant requirement, it could be argued that Chimel presented a stronger case for a warrantless search because the arrest was made pursuant to a valid warrant. Thus, a neutral magistrate had determined the existence of probable cause, a factor totally absent in the instant case.

8. Amici do not agree with the Government's historical interpretation, however, a point-by-point refutation is unnecessary for it is the construction and application of the Fourth Amendment by this Court that is the significant and controlling history.

answer to the question presented is to be found in this jurisprudential history.

This Court has repeatedly emphasized that there are two fundamental principles embodied in the Fourth Amendment. First, the "basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, supra at 528. E.g., United States v. Ortiz, supra at 895; United States v. United States District Court, supra at 312-313; Mapp v. Ohio, 367 U.S. 643, 657 (1961); Wolf v. Colorado, 338 U.S. 25, 27 (1949); McDonald v. United States, supra at 453; Boyd v. United States, supra at 630. As Justice Brandeis proclaimed, "as against the government," the Fourth Amendment confers "the right to be let alone--the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

Second, the Fourth Amendment's warrant requirement embodies the principle that the determination of when that right to privacy must yield is to be decided by a judicial officer and not a law enforcement agent. E.g., G.M. Leasing Corp. v. United States, 45 U.S.L.W. 4098, 4102 (U.S. January 11, 1977); Almeida-Sanchez v. United States, 413 U.S. 266, 279-285 (1973) (Powell, J., concurring); United States v. United States District Court, supra; Katz v. United States, supra; Camara v. Municipal Court, supra at 528-29, 533-34; United States v. Rabinowitz, supra at 82) (Frankfurter, J. dissenting); McDonald v. United States, supra; Johnson v. United States, supra. Accordingly, "[s]earches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause' . . ." Katz v. United States, supra at 357 (quoting from Agnello v. United States, 269 U.S. 20, 33 (1925)). So firmly established is this principle that this Court has stated: "[T]he

most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment. . . ." Coolidge v. New Hampshire, supra at 454-455.

It is this rule which the Government here challenges. It argues, in effect, that searches without warrants are per se reasonable subject only to three exceptions--the search of a home, office or private communications. It argues that the Court really did not mean what it said in Coolidge v. New Hampshire, supra, and that the authors of the Bill of Rights did not intend such a rule. It is sufficient response to this argument to quote the Coolidge Court's answer:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won--by legal and constitutional means in England, and by revolution on this continent--a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. 403 U.S. at 455 (footnotes omitted).

The government argues further that the opportunity to procure a warrant is immaterial and that the relevant test under the Fourth Amendment is whether the search was reasonable. There is no better response to this argument than that given by Justice Powell:

> This view, however, overlooks the second clause of the Amendment. The warrant clause of the

> Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over the country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." United States v. United States District Court, 407 U.S. at 315-16.

The Fourth Amendment arose as a response to arbitrary government intrusion into individual privacy. It is couched in general terms as a broad restraint on all forms of official intrusion. In over 100 years of Fourth Amendment jurisprudence, this Court has defined and applied the Amendment's general principles. It is the history of that jurisprudence which must guide the resolution of the issues posed by this case, and that history compels the conclusion that a warrant is required before law enforcement officials may search closed containers and locked trunks.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1721

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOSEPH A. CHADWICK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE, IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION INC; AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1721.

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOSEPH A. CHADWICK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC.; AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICES, INC.

Americans for Effective Law Enforcement, Inc.; the National District Attorneys Association, Inc.; and the International Association of Chiefs of Police, Inc. respectfully move this court to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The Solicitor General has consented in writing to the filing of Americans for Effective Law Enforcement and the National District Attorneys Association. The office of the Solicitor General has consented verbally to the filing of the International Association of Chiefs of Police and when we re-

ceive written consent to this filing we will immediately file it with the Clerk of the Court, as we have done with the original consent from the Solicitor General. The respondent has not responded to our letters requesting his consent. Accordingly, we are moving the Court directly for leave to file. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law;
2. To inform the public of those needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens;
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

The National District Attorneys Association, Inc. (NDAA) is a not-for-profit, non-political, tax exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the NDAA are, *inter alia,* to improve and facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims, the NDAA for many years has utilized an *Amicus Curiae* Committee to file briefs in cases of

national importance in the United States Supreme Court. The NDAA seeks to make known the views of all prosecutors in the United States and to bring before this Court their positions on matters affecting the discharge of the duties of the prosecutor.

The International Association of Chiefs of Police, Inc. (IACP) is a not-for-profit professional association, and represents over 7,000 chiefs and top executives of American police departments and other law enforcement agencies in all 50 states and in 57 foreign countries. The IACP services the law enforcement profession and the public interest by advancing the art of service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

The IACP Legal Officers' Section is the only nationally organized body of police legal advisors. They serve as house counsel to 188 law enforcement agencies representing nearly 200,000 police officers and sheriff's deputies in the United States. Most of them are active and participating members of the Section.

The interest of the *amici* in the instant case stems from the importance of the issues involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement. The question directly at issue—whether police officers must procure a search warrant prior to the search of a footlocker found in the car of suspects arrested on probable cause—raises important legal and practical problems for police officers nationwide. *Amici* believe, however, that there are two overbearing policy issues involved here: 1. the question of whether a standard of reasonableness should be set for determining the legality of searches and seizures in cases such as the instant case; and 2. the question of whether the good faith shown by the arresting officer should have a bearing in deter-

mining whether a search and seizure was reasonable. These are the questions to which *amici* will address ourselves and wherein our interest lies.

Respectfully submitted,

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BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC.; AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.

ARGUMENT.

I. This Court Should Establish a Standard of Reasonableness, Under the Fourth Amendment, for Determining the Legality of Searches and Seizures in Cases Such as the Instant Case.

Amici consider this case to be of more than usual importance because it presents this Court squarely with the opportunity to resolve, if it wishes, a fundamental Fourth Amendment issue. This issue was characterized by the Solicitor General of the United States in his Petition for Certiorari in the instant case:

Dombrowski, 413 U. S. 433 (1973), *Cardwell* v. *Lewis,* 417 U. S. 583 (1974); arrested persons, *United States* v. *Robinson,* 414 U. S. 800 (1974). In each of these cases a warrantless search was upheld as reasonable (often over vigorous dissent); however, the critical factor in the decision was *what* was being searched rather than addressing the more fundamental issue of reasonableness as opposed to the *per se* warrant requirement.[2]

This Court has recognized this inherent difficulty and confusion. In *Cady* v. *Dombrowski, supra,* Mr. Justice Rehnquist, speaking for the majority, stated with respect to search and seizure cases, particularly those involving vehicles:

> While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web. (413 U. S. at 440.)

The confusion is not limited to automobile searches. The instant case involves the question of searches and seizures, based upon probable cause but[3] without a warrant, of movable personal property. The Solicitor General in his petition for Certiorari has cited to the Court no less than 22 lower court

2. Mr. Justice Stewart, writing for the plurality in *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971), described the differing judicial philosophy involved in the Fourth Amendment interpretation:

- Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that
- a test of reasonableness, applied after the fact of search and seizure when the police attempt to introduce the fruits in evidence, affords ample safeguards for the rights in question so that "(t)he relevant test is not whether it is reasonable to procure a search warrant but whether the search was reasonable."

3. Judge Thomsen, dissenting from the majority opinion of the Court of Appeals below, described the problem of conflicting court opinions as ". . . the thicket through which state and federal judges, as well as state and federal law enforcement officers, must struggle in cases like this." (532 F. 2d 773 at 786.)

cases, both federal and state, which have reached differing conclusions on the issue presented by the instant case. (Pet. pp. 11-12, ft. 4-8.)

In fact, the Court of Appeals below in suppressing the fruits of the search of the footlocker spoke of: " 'gossamer thin' distinctions which arresting officers could find impracticable, if not impossible to follow." (532 F. 2d 773 at 780.)[4] This statement, we submit, precisely describes the plight of law enforcement officers who are confronted with search and seizure situations. If learned judges of federal and state appellate courts cannot agree about what is and what is not an "unreasonable" search and seizure, the plight of the policeman, untrained in the law and acting under the pressures of law enforcement "on the street," is compounded.

The single most trenchant comment about this situation was made by Mr. Justice Clark dissenting in *U. S.* v. *Chapman,* 365 U. S. 610 (1961):

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problems of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. (at 622.)

We respectfully submit that the instant case is an appropriate vehicle for this Court to lay down a general rule of search and seizure based not so much on the particular factual situation of a given case (i.e. movable personal property, vehicles, etc.) but based on an interpretation of when a warrantless search is reasonable under the "reasonableness clause" and when a search is *per se* unreasonable under the "warrant clause." Such a ruling would go a long way towards providing the "clarity and understanding" called for by Mr. Justice Clark. (*Chapman, supra.*)

4. The same approach has been suggested by the Solicitor General in his Petition for Certiorari at page 10, ff.

The historical basis of the Fourth Amendment is not of controlling import when we are confronted with questions of searches of automobiles, their contents, or the belongings of railroad train passengers, because, obviously, automobiles and railroad trains were not in existence in 1789 when the Fourth Amendment was framed. Historically, the Amendment was aimed at prohibiting the evils of a general warrant ". . . which either does not give the name of the person to be apprehended, or does not specify any particular place to be searched."[5]

Of interest in the dichotomy between the "warrant clause" and the "reasonableness clause" is the following commentary from the Annals of Congress, Vol. 1, pp. 686-792, House of Representatives Debates, July—August, 1789, regarding amendments to the Constitution, particularly searches and seizures:

> The committee went on to the consideration of the seventh clause of the fourth proposition, being as follows: 'The right of the people to be secured in their persons, houses, papers and effects shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.'
>
> Mr. Gerry said he presumed there was a mistake in the wording of this clause; it ought to be 'the right of the people to be secure in their persons, houses, papers and effects, against *unreasonable* searches and seizures' and therefore moved that amendment.
>
> This was adopted by the committee.[6] (emphasis supplied.)

The "warrant clause" was then added, which gives some evidence that even the framers of the Constitution were more

5. David Hutchinson, "The Foundation of the Constitution," University Books, Inc., Seacouch, New Jersey (1975), p. 293. See also: *Entick* v. *Carrington,* 19 How. St. Tr. 1029 (1765) in which such warrants were held invalid by the House of Lords in England.

6. Bernard Schwartz, "The Bill of Rights: A Documentary History," Chelsea House Publishers, McGraw Hill Book Company, New York (1971), Vol. II, p. 1112.

concerned with *unreasonable* searches and seizures than with a *per se* warrant requirement.

The Court of Appeals below was asked by the United States to decide the case based on the "reasonableness" of the search of the footlocker. This it expressly refused to do.[7] It chose, rather, to base its opinion on *Chimel* v. *California,* 395 U. S. 752 (1969) which mandated a *per se* warrant rule for searches of dwellings. The lower court held that the language in *Chimel* which limited searches of areas of *dwellings,* incident to arrest, to those areas within the immediate control of the arrestee, applied to the facts of the instant case.

The *per se* rule for dwellings enunciated in *Chimel* is currently the settled law on the matter.[8] However, the fact remains that the instant case does not involve a dwelling. The lower court acknowledged that baggage in transit presented some of the characteristics of automobiles, for which warrantless searches have been upheld; nevertheless, it felt constrained to apply the *per se* rule of *Chimel* v. *California.* It stated specifically that if a relaxation of the warrant rule for baggage should take place it would be up to this Court to so hold.[9]

We urge this Court to clarify the question of warrantless searches of movable personal property, at least; but as indicated above, we further urge the Court to speak definitively on the obvious tension between the *per se* rule of the "warrant clause" of the Fourth Amendment and the more flexible standards of the "reasonableness clause."

We would respectfully suggest a possible basis for a ruling which would clarify the distinction between the two classes of searches. Setting aside the question of searches of dwellings and offices, which the "warrant clause" would seem to control

7. 532 F. 2d 773, at 779.

8. Even *Chimel* recognized exceptions to the *per se* warrant rule, e.g. exigent circumstances, *McDonald* v. *United States,* 451 U. S. 335 (1948), *United States* v. *Johnson,* 333 U. S. 10 (1948), Cf. *Vale* v. *Louisiana,* 300 U. S. 30 (1970).

9. 532 F. 2d 773 at 780, ft. 4.

(*Chimel* v. *California, Vale* v. *Louisiana*), and for which a *per se* warrant rule has been established, the more recent cases, in which this Court has applied a "reasonableness" standard, have one element in common: the arrest—the primary invasion of individual privacy—had already taken place properly and with a probable cause. (*Chambers* v. *Maroney, Cady* v. *Dombrowski, Cardwell* v. *Lewis, United States* v. *Robinson, United States* v. *Edwards, supra.*)

In each case a seizure of the person (or persons), which was held to be lawful, had transpired. The arrest was proper. Mr. Justice White speaking for a majority of the Court in *Chambers* v. *Maroney, supra,* developed the concept of "greater" and "lesser" invasions of privacy based upon the premise of a lawful seizure of the person. He stated:

> But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For Constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. (399 U. S. 42 at 51.)

Concededly, the language quoted above has reference to the search of an automobile. Motor vehicles, because of their mobility, have always had more flexible standards of search and seizure applied to them. *Carroll* v. *United States,* 267 U. S. 132 (1925). However in *Chambers* v. *Maroney, supra,* the automobile in question had been seized and taken to the police station, as by analogy, the footlocker in this case had been. The point in *Chambers,* as we understand the ruling, was that the vehicle in that case *could have been* searched at the scene of the arrest, which was lawful, and there was probable cause to search it; therefore, the search at the police station was the "lesser intrusion" under the Fourth Amendment and therefore reasonable.

We submit that the instant case is far more analogous to the *Chambers, Cady, Cardwell* line of cases than to *Chimel* v. *California.* The footlocker in this case was placed in the trunk of Chadwick's car for one purpose and one purpose only: to be driven off (the other luggage of Machado and Leavy had been placed in the car).

The majority of the lower courts characterized the trunk of Chadwick's car as ". . . nothing more than a platform or resting place for the footlocker."[10] This, we submit, is unrealistic. Should the agents have waited until Chadwick, Machado and Leavy drove off before stopping them in order to qualify for the *Chambers, Carroll* exception to the warrant requirement, with the attendant risk of losing their car in traffic?[11]

We believe that the automobile exception to the warrant requirement would have permitted a search of the footlocker at the Amtrak station when the arrest was made. Probable cause clearly existed to search the footlocker. *Carroll* v. *United States, supra.* If the search could have been made then, the "lesser intrusion" theory of *Chambers* v. *Maroney, supra,* applies by analogy to the search of the footlocker at the DALE office.

We would, thus, suggest that the recent teachings of this Court, in cases dealing with searches which do not involve dwellings or offices, clearly indicate that (1) where there is probable cause to search for contraband or evidence, (2) where a lawful arrest has been made which involves a person, movable personal possessions or vehicles, and (3) where a search of such effects would be permissible at the scene of the arrest; then the "reasonableness clause" of the Fourth Amendment should control.

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10. 532 F. 2d 773 at 778.

11. Cf. *United States* v. *Bozada,* 473 F. 2d 389 (1973), in which the United States Court of Appeals for the Eighth Circuit (*en banc*) sustained the warrantless search of a trailer full of stolen goods even though the tractor cab had not been hooked up to the trailer. The court based its decision on "reasonableness."

The statement approved by this Court in *United States* v. *Edwards,* 415 U. S. 800, is apposite:

> While the legal arrest of a person should not destroy the privacy of his *premises,* it does— for at least a *reasonable* time and to a *reasonable* extent—take his own privacy out of the realm of police interest in weapons, means of escape and evidence. (At 808, 809, emphasis supplied.)

We urge this Court to rule accordingly in this case.

II. The Fact That Law Enforcement Officers were Acting in Good Faith Should be Given Weight in Determining Whether a Given Search and Seizure was Reasonable.

Amici are aware that the viability of the Exclusionary Rule has not been certified in the instant case and we will not argue the matter. Nevertheless, we believe that the dissent of Mr. Justice White in *Stone* v. *Powell* and *Wolff* v. *Rice,* ..... U. S. ....., 96 S. Ct. 3037 (1976) has a bearing on our contention that *reasonableness* should be the criterion for judging the lawful nature of those classes of searches and seizures which we have discussed in part I of our Argument in this case.

Mr. Justice White, in *Stone and Wolff, supra,* indicated that he would ". . . join four or more other Justices[12] in substantially limiting the reach of the exclusionary rule as presently administered under the Fourth Amendment in federal and state criminal trials."[13] He based this opinion on the proposition that in ". . . many circumstances . . . the evidence was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for the belief."[14]

12. Mr. Chief Justice Burger has also indicated a willingness to modify or do away with the Exclusionary Rule. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U. S. 388 (1971) at 414 (dissenting opinion); *Stone* v. *Powell, Wolff* v. *Rice,* U. S. ....., 96 S. Ct. 3037 (1976) at 3052.

13. ..... U. S. ....., 96 S. Ct. 3037 (1976) at 3072.

14. *Ibid.*

He continued:

> When law enforcement personnel have acted mistakenly, but in good faith and on *reasonable* grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect.[15] (Emphasis supplied.)

The key word in this statement is the word "reasonable." The Court of Appeals below found expressly that ". . . there is no evidence that (the agents) acted in bad faith:"[16] We submit that, particularly insofar as the warrantless search of the footlocker is concerned, the agents acted in a good faith belief, which was reasonable, that they were acting properly.

If, as we suggest, a standard of "reasonableness" is to be applied to cases such as the instant case, then the good faith (or lack of bad faith) of the law enforcement officers involved has a specific bearing upon whether the search and seizure was reasonable.

When this Court chooses to consider the continued viability of the Exclusionary Rule, the issue of good faith police action will be one of the, if not *the,* primary questions. Until that time however, we submit that the good faith issue should be seriously considered in any case in which the contention is made that a given search and seizure is "reasonable" and should be sustained under the "reasonableness clause" of the Fourth Amendment.

CONCLUSION.

The confusion that exists in the minds of law enforcement officers and even lower courts is amply demonstrated by the instant case. This confusion appears to stem in large measure from the tension between the "warrant clause" and the "reasonableness clause" of the Fourth Amendment. A definitive ruling by this Court on this matter would go a long way towards resolving this confusion.

15. *Ibid,* at 3073.

16. 532 F. 2d 773 (1976) at 785.

We respectfully suggest a ruling which would declare warrantless searches of vehicles, persons and movable personal property at a place remote from the place of a lawful arrest to be proper under the "reasonableness clause" of the Fourth Amendment. Such a ruling would be a development of the "lesser intrusion" theory enunciated in *Chambers* v. *Maroney, supra.*

We also submit that the fact that law enforcement officers were acting in good faith, while not controlling under present Fourth Amendment law, should be accorded weight in determining whether a given search and seizure, in cases such as the instant case, was reasonable.

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